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*The American Journal of*

# COMPARATIVE LAW

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MARIO ROTONDI

# The Contract of *Agenzia* in the New Italian Civil Code and Judicial Decisions

1. The word *agente,* which but a short while since acquired an unambiguous technical meaning, though clearly of Latin origin, in fact came to Italy relatively recently by way of the English term *agency,*[1] which, as is known, is vague in content and has no exact counterpart in the concepts of our Continental system. Formerly, it was used to designate branches in the true and proper sense or secondary offices representing foreign enterprises (and only in this sense was it considered in the Commercial Code of 1882 in art. 376). This original meaning of an organization with functions peripheral or auxiliary to the enterprise, gradually came to include organizations no longer dependent, but completely independent, which retained the function of furnishing auxiliary services or of collaborating in the program of the enterprise, this being particularly advantageous for concerns unable to assume—like the greatest ones—the permanent burden of auxiliary units directly maintained by them at home and abroad, that thus could employ independent organizations to promote their undertakings in various centers. The term ended by embracing, along with the dependent *agenti,* also independent *agenti;*[2] for these alone this expression has now come to be reserved in its technical sense; it excludes, despite common usage, professional organizations and individuals offering their services to any interested person: business agents, forwarding agents, theatrical[3] and patent agents, as well as stockbrokers whose classification as mediators is controverted, but who certainly have no relation to what today is the technical meaning of the contract of *agenzia.*

Leaving aside this last extension of the expression so as to include types or relations that are utterly foreign to *agenzia,* it is certain that the terminology was for a long time—and in part still today is to a lesser degree—vague and uncertain.[4] Inasmuch as peripheral collaborators in an enterprise, who generally represent its interests, products, or services, but do not in fact have legal representative capacity, nor the characteristic powers of one invested with a procuration, have often been called representatives, in consequence *agente* has indiscriminately designated the dependent auxiliaries of an enterprise and free-lance pro-

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[1] *Cf.,* Giordano, Il contratto d'agenzia, Bari, 1959, 3.

[2] *Cf.,* App. Milano, January 20, Foro Padano 1950, II. 20.

[3] *Cf.,* Trib. Milano, September 30, 1954, in 1955 Rassegna di diritto cinematografico, 96.

[4] *Cf.,* App. Torino, January 11, 1958, Foro It. Rep. 1958, v. *Agenzia,* 6.

fessionals, proprietors of an autonomous enterprise, exclusively engaged in performing an activity supplementary to the enterprise or enterprises of another.

In an endeavor to clarify the terminology, Vidari contrasted, among the auxiliaries of the merchant, his true and proper representatives with the *agenti,*—namely, "those who undertake to procure buyers or sellers, in brief, clients, for their own principal and to transmit to him the inquiries and offers which they receive, but are not authorized to obligate third parties to him, nor him to third parties." He admitted that at times in practice (chiefly in the case of insurance companies) the term *agenti* is given to those whom we call representatives."[5]

Vivante advised, in view of the terminological uncertainty of the usage, that "to judge whether one is a representative in the meaning of the law no attention must be given to the title he takes. It matters little whether he be styled *agente* or representative; commercial practice has little subtlety and often invests humble offices with pompous names. If his regular office is to do and to conclude business systematically on behalf of the principal, he is a representative; if his office be that of simply procuring business, of transmitting proposals to the principal, to be accepted or rejected, he is not a representative even though he may assume the name."[6]

Just prior to the new Code, Asquini, admitting the possibility of *agenti* with representative capacity, put forward the distinction between representative and nonrepresentative commercial *agenti.*[7] But it is clear that even this distinction does not correspond to present legislative usage, because there may be dependent collaborators who are not representatives, and independent *agenti* exceptionally given powers of representation, even beyond the restricted limits of such representation as our law has recognized in the relation of *agenzia,* as we shall see.

But in the present law there finally emerged—and for the first time in the economic agreement of 25 May, 1935, concluded pursuant to the law of 2 April 1926, n. 563, published by the Decree of the Head of Government, 5 July, 1935, n. 1203[8]—the contract of *agenzia,* with its own characteristics, as a form of contract, and hence the category *agente,* having as its elements the *permanent character* of the undertaking and *autonomy*: "The commercial *agente* is an autonomous entrepreneur." (Cass. 14 Feb. 1956 n. 417).[9] These characteristics suffice

[5] *Cf.,* Vidari, 1 Corso di diritto commerciale, Milano, 1877, 411.

[6] *Cf.,* Vivante, 1 Trattato di diritto commerciale (5th ed.) Milano, 1929, n. 277.

[7] *Cf.,* Asquini, "Il rapporto di agenzia commerciale nell'accordo collettivo, 12 luglio 1932," 1935 Riv. dir. comm., I, 505.

[8] Renewed at its expiration by the new contract of June 30, 1938, published by the Governmental Decree of November 17, 1938, n. 1784. Previously, *agenzia* was dealt with in article 34 of the Royal Decree of April 1923, n. 966, on foreign insurance companies, converted into Law of April 17, 1925, n. 473.

[9] 1957 Riv. dir. comm. I, 1.

to distinguish the *agente* from all those who, with varying titles and functions, carry on *a subordinate activity as dependents and employees.*[10]

[10] On the contract of *agenzia* in the new Code, *cf.*, Formiggini, "Il contratto di agenzia," Trattato di diritto civile (ed. Vassalli) Torino, 1952 (reviewed by Bigiavi, in 1953 Rivista trimestrale di diritto e procedura civile, 1120); in addition, others: "Agenzia," 1 Nuovissimo Digesto Italiano; Giordano, Il contratto d'agenzia, Bari, 1959; and also the treatises and comments on the new Code: Mossa, 1 Trattato del nuovo diritto commerciale, Milano, 1942, 532–569; Ferri, Manuale di diritto commerciale, Torino, 1950, 572 *et seq.*; Salandra, 1 Manuale di diritto commerciale, Bologna, 1946, 49 *et seq.*; Ferrara, Imprenditori e società (3rd ed.) Firenze, 1955, 56 *et seq.*; De Gregorio, Corso di diritto commerciale, Roma, 1945, 131–136; Valeri, 2 Manuale di diritto commerciale, Firenze, 1950, 222–227; Russo, Commentario al Codice Civile (ed. d'Amelio-Finzi) 2 Libro delle obbligazioni, Firenze, 1947; Dei contratti speciali, Part I, 523–539; Di Blasi, in Commento al nuovo codice civile italiano, Libro delle obbligazioni, Parte Speciale, Milano, 1943, 330–338. There are a great number of critical notes, mainly connected with the trend in the courts: M. Andreoli, "Un dibattito di attualità sui contratti di agenzia e di rappresentanza commerciale," 1954 Massimario di giurisprudenza del lavoro, 210; A. Angelelli, "Il rapporto di agenzia e la legge sindicale, 1953 Rivista di diritto del lavoro, I, 185; L. Antonelli, "Aspetti del diritto alla provvigione nei contratti di mediazione e di agenzia," 1952 Rivista giuridica abruzzese, 52; Ascarelli, "Sulla revoca di un agente di commercio," 1955 Foro It. I, 519; E. M. Barbieri, "Appunti sull'indennità per lo scioglimento del contratto di agenzia," 1959 Foro It. I, 1288; M. Bianchi, "Sulla qualifica di agente di commercio," 1960 Temi Genovese, 52; Bigiavi, "Sul concetto di agente di commercio," 1931 Studi urbinati, 22; A. Bonanno, "Il rapporto di agenzia," 1947 Foro It. I, 613; M. Boneschi, "Involuzione del contratto di agenzia e del suo regime di scioglimento," 1955 Rivista di diritto industriale, II, 225; E. Borselli, "Contratto di agenzia e zona esclusiva," 1959 Il nuovo diritto, 148; E. Borselli, "Indennità per scioglimento del contratto di agenzia," *ibid.*, 1959, 752; P. Buquicchio, "Sui diritti dell'agente in caso di inesecuzione del contratto," 1956 Foro Padano, 1438; G. Cattaneo, "Osservazioni in materia di contratto di agenzia," 1956 Temi, 346; F. De Amicis, "Indennità per scioglimento del contratto di agenzia e previdenzia ex accordo economico collettivo," 1954 Rivista Giuridica del lavoro, II, 388; F. De Amicis, "Indennità per scioglimento del rapporto di agenzia," 1955 Mon. Trib., 405; G. De Amicis, "Indennità per lo scioglimento del contratto di agenzia," 1953 Rivista Giuridica del lavoro, I, 173; G. De Amicis, "Rapporto di agenzia, indennità ex art. 1751 cod. civ. e quistione del cumulo con la 'previdenza' E.n.a.s.a.r.c.o. ex accordo economico collettivo 30 giugno 1938," 1959 Rivista giudiziaria del lavoro, II, 433; F. De Amicis, "Art. 1751 cod. civ. e accordo economico collettivo 30 giugno 1938," 1959 Mon. Trib. 364; E. Favara, "Conseguenze della risoluzione del contratto di agenzia," 1954 Giurisprudenza completa della Suprema Corte di Cassazione—Sezione Civili, 4° bim., 153; E. Favara, "Recesso del contratto di agenzia ed indennità di scioglimento di contratto," 1954 Giurisprudenza completa della Suprema Corte di Cassazione—Sezione Civili, 3° bim., 270; Ferrari, "Se l'agente di assicurazione sia mandatario," 1951 Rivista trimestrale di diritto e procedura civile, 766; P. E. Ferrero, "La figura del procacciatore d'affari," 1956 Diritto dell'economia, 808; A. Formiggini, "Il procacciatore occasionale di affari," 1952 Rivista trimestrale di diritto e procedura civile, 1215; A. Formiggini, "Sul riparto della provvigione in caso di successione nel contratto di agenzia," 1954 Giur. it. I, 1,983; A. Formiggini, "Risoluzione del contratto fra la casa e il terzo e diritti dell' agente," 1956 Temi, 609; A. Formiggini, "Lo storno di agenti di commercio," 1956 Rivista di diritto industriale, II, 48; M. P. Galassi, "In materia die agenzia: indennità per la risoluzione del contratto: trattamento di previdenza: mancato versamento di contributi, Enasarco ecc.," 1955 Temi, 471; C. Giannatasio, "I diritti dell'agente con particolare riferimento alla indennità di risoluzione del contratto di agenzia a tempo indeterminato," 1955 Diritto dell'economia, 692; C. Giannatasio, "Diritto del rappresentante di commercio verso l'impresa," 1942 Riv. dir. comm. II, 106; *id.*, "Agente e figure affini con speciale riguardo ad una forma marginale di agenzia e di mandato," 1956 Diritto dell'economia, 484; G. Giordano, Il progetto di legge sul rappresentante di commercio in Germania, Roma, 1951; *id.*, Il contratto di agenzia ed il privilegio a

2. Thus at present, the commercial *agente* is one who procures clients and business. "The contract of *agenzia,*" states Wieland,[11] "establishes a relation of service, but not therefore a relation of employment. The commercial *agente* is not a subordinate, but a person who stands at the side of the principal of the undertaking. He receives from the latter tasks and instructions, but has liberty of movement even in the means to execute them. He freely arranges his work day and how it is to be used. He is accountable to his principal but is not therefore subject to his regular supervision and control."

The types and relations of the auxiliaries or collaborators of an enterprise can be most diversified. As distinguished from those who function

favore degli agenti nel nuovo codice civile, Roma, 1941; A. Giordano, "Carattere continuativo ed unitario del contratto di agenzia agli effetti del recesso del preponente," 1952 Assicurazioni, II, 80; M. Guidi, "Indennità di risoluzione del contratto di agenzia e trattamento E.n.a.s.a.r.c.o.," 1959 Il diritto del lavoro, II, 291; Hueck, "La riforma del diritto del rappresentante di commercio, 1941 Riv. dir. comm., I, 143; G. Iannìruberto, "Risoluzione del contratto di agenzia a tempo determinato," 1959 Diritto e giurisprudenza, 187; G. Landi, "Sul contratto di agenzia generale dell'Istituto nazionale dell Assicurazioni," 1947 Assicurazioni, II, 53; *id.,* "Contratto di agenzia, accordi economici collettivi a disciplina professionale degli agenti di assicurazione," 1952 Assicurazioni, I, 80; A. La Torre, "In tema di indennità per lo scioglimento del contratto di agenzia," 1958 Giurisprudenza siciliana, 678; Ligi, F. "La disciplina della concorrenza e il contratto di agenzia con esclusiva in una interessante fattispecia," 1957 Rivista di diritto civile, I, 196; Lordi, "Sulla figura giuridica del remisier di borsa," 1950 Banca, borsa e titoli di credito, II, 122; G. P. Melzi D. 'Eril, "L'indennità dell' art. 1752 cod. civ. e il trattamento di previdenza per gli agenti e rappresentanti," 1954 Foro Padano, I, 1138; *id.,* "'Cumulo' dell' indennità ex art. 1751 cod. civ. con gli accantonamenti previdenziali," 1959 Foro Padano, I, 1069; Minervini, in 1959 Foro civile, 67; *id.,* "Agente occasionale o mediatore parziale?" 1951 Giurisprudenza completa della Suprema Corte di Cassazione—Sezione civili, I, 89; *id.,* "Contratto di agenzia e blocco dei prodotti del preponente," 1948 Rivista trimestrale di diritto e procedura civile, 667; A. Montel, "Questioni sull'art. 1 dell'accordo economico collettivo per la disciplina del rapporto d'agenzia e rappresentanze commerciale," 1942 Rivista dell' impiego privato, 28; N. Pinto, "In tema di contratto di agenzia e sua risoluzione," 1951 Giur. Toscana, 45; *id.,* "Sulla natura giuridica del contratto di agenzia commerciale," 1958 Rivista giuridica del lavoro, I, 341; C. M. Pratis, "Diritto di recesso e indennità per lo scioglimento del contratto di agenzia," 1950 Giurisprudenza completa della Suprema Corte di Cassazione—Sezione Civili, 3° quadr., 501; U. Prosperetti, in 1956 Assicurazioni, I, 122; R. Richard, "Indennità e trattamento di previdenza nella risoluzione del contratto di agenzia," 1956 Diritto del lavoro, II, 132; M. Scorza, "Sulla indennità di risoluzione del contratto di agenzia," 1956 Foro it., I, 1217; A. Sermonti, "Ancora del trattamento dell'agente per fine del rapporto di agenzia," 1956 Massimario dell giurisprudenza del lavoro, 42; V. Simi, "L'indennità per lo scioglimento del rapporto di agenzia e le pretese forme equivalenti di previdenza," 1955 Rivista giuridica del lavoro, II, 236; R. Sorace, "Ancora sull' indennità di risoluzione del contratto di agenzia," 1959 Temi, 422; L. Stenico, "Riflessioni e problemi di attualità in tema di contratto di agenzia," 1959 Corti di Brescia e Venezia, 272; T. Tabellini, "Diritti dell'agente di commercio per giusta causa. Indennità ex art. 1751 cod. civ. e trattamento previdenziale ENASARCO," 1957 Riv. dir. comm., II, 63; A. Torrente, "In tema di indennità per scioglimento di rapporto di agenzia," 1955 Rivista di giurisprudenza del lavoro, II, 513; C. Varrelli, "Agente di commercio con rappresentanza," 1954 Giurisprudenza completa del Suprema Corte di Cassazione—Sezione Civili, 4° bim., 105; P. Vercellone, "Disdetta, recesso discrezionale e recesso per giusta causa con riferimento al contratto di agenzia," 1957 Diritto dell' economia, 314.

[11] *Cf.,* Handelsrecht, München-Leipzig, 1931, 354.

sporadically, the messenger who communicates declarations of intent of a contracting party, the procurer of business who solicits opportunities to contract either directly for the entrepreneur or for an *agente,* there are the procurator—sometimes as the manager in charge of a branch or shop—who is invested with the right of procuration; the salesman, who ordinarily sells subject to the company's approval (and sometimes is in his turn the auxiliary of an *agente*); the advertising agent, who limits himself to advertising without concluding contracts[12] (which thus excludes commission as remuneration); the dependent inspector charged with checking the operations of others; the commercial traveller. It must always be borne in mind that the title formally used by the parties signifies nothing; what counts is only the nature of the relation with the principal or promoter and the extent of the powers held.

But in contrast to all these types of collaborators or dependent auxiliaries stands the category of *agente,* characterized by his autonomy. This fundamental criterion of the distinction between all the collaborators subordinate to the management and the *agente* who conducts an autonomous professional activity and in turn may be the proprietor of an enterprise of his own, is clearly posited in the preparatory works of our Code[13] and also in the most modern legislation.[14] Our case-law

[12] Cass. April 18, 1955, n. 1072 in Foro. it. Rep. 1955, 141; App. Roma, May 17, 1956, in Foro. it. Rep. 1957, v. *Agenzia,* n. 4, 5; App. Torino, January 10, 1956, in Foro it. Rep. 1956, v. *Agenzia,* n. 12; Trib. Milano, May 30, 1956, in 1957 Riv. dir. comm. II, 411.

[13] Already in the preliminary draft of the new commercial code, Vivante explained: "They (the agents) are considered in the draft as merchants inasmuch as they possess a fixed place of business where they habitually contract business."

The Report of the Ministers (n. 106) said: "The relation of *agenzia* is autonomous for the reason that it concentrates a number of elements which, individually, would belong to other types of contracts: mediation, mandate, subcontracting, which contain two conditions that qualify in a characteristic way the form of *agente:* the *stability* of his connection with a certain firm with which, even though limited to isolated and occasional payments, he normally co-operates in the production and the development of the commercial business of the firm; the *independence* of his professional activity at his own cost and risk, on account of which, in spite of the element of stability, he may not be included in the category of subordinate workers in general, or professional employees in particular."

[14] The German Commercial Code of 1898, which created for the first time this new type and the Austrian law of 1921 governing commercial agents, had as their point of departure the criterion of commercial agents; contrary to employees, they are autonomous businessmen. This concept, which was generally opposed in Latin countries, was finally taken over by us in the projects of reform of the Commercial Code even before the repeal of that Code, and was finally embodied in the last Civil Code.

The Swiss system is significant, the Law of February 4, 1949 having introduced the contract of *agenzia* in the Code of Obligations. Article 418 reads: "An agent is who undertakes the obligation to mediate regularly in the affairs of one or several principals or to conclude business in their name or their charge without standing in the relation of an employee with such principals." Article 418 continues: "The negotiating agent is governed by the rules on brokerage, the concluding agent by the rules on commission, respectively."

With regard to Austria (Law of June 24, 1921), *cf.,* H. Petsch, "L'agente di commissario nel diritto austriaco," Il diritto degli scambi internazionali, 1959, 147.

—which on account of the deceptive appearances that superficially may confuse the two types and the important practical consequences resulting from affirmation or exclusion of an employment relation, has had frequent occasion to concern itself with the problem—has taken care to define the distinctive criterion drawn from the presence in greater or less degree of a relation of *subordination.*[15]

[15] Even before the present Code, a judgment of the Court of Cassation of July 31, 1939, n. 3038, had held that "whoever has an aleatory reward and takes upon himself all the economic risks of his own work and the possible losses of management is not only not employed but conducts a work activity as the owner of his own autonomous enterprise of economic speculation." *Cf.,* L'agente di commercio, 1939, n. 12 (December). It was held that a fixed compensation does not always exclude the qualification of *agente:* Cass. October 4, 1936, in 1936 Giur. it. Rep., 416.

Moreover, the principle is constantly affirmed: "Subordination furnishes the distinctive criterion of the relation of a private employee as distinct from the relation of hiring out autonomous service, which is done without that hierarchical and disciplinary dependency that binds one who contributes labor to the orders, the limitations, and to the unilateral initiative of the one who gives employment." Cass. Jan. 8, 1943, n. 24, in L'agente di commercio, 1943, n. 3 (March).

"The employed salesman is subject to a bond of dependency and subordination expressed in the duty to comply with the directions given by the employer in carrying out the tasks entrusted to him, above all with regard to the itinerary to be followed, the clients to be visited, and the use of time," while the "free *agente* or commercial representative . . . instead retains full autonomy over the choice of clientele, the itinerary to be followed, and the use of his own time; he cannot therefore be considered an employee of the enterprise on whose behalf he hires out his own services." Cass. April 10, 1951, n. 837; in 1951 Giur. it. Mass. 66; *cf.,* Cass. May 8, 1957, in 1957 Giur. it. Mass., 351.

"The object of the contract of *agenzia* is the performance, at the risk of the *agente,* of an organized and autonomous economic activity which takes the form of work and is tied to the employer by an established relation of collaboration, while the object of the subordinate work relation is to furnish the energy of labor in a regime of subordination, the organization, the product, and the risk of which are exclusively within the sphere of the employer." Cass. July 28, 1956, n. 2944. *Cf.,* 1956 Massimario della giurisprudenza dellavoro, 26 and 1957 Foro it. Rep. v. *Agenzia,* n. 10-11.

"The distinctive criterion between a contract of *agenzia* and a subordinate work relation must be sought in the fact that the object of the contract of *agenzia* is the performance, at the risk of the *agente,* of an organized and autonomous economic activity realised in the result of the work, and bound to the employer by a stable relation of collaboration, while the object of the second relation is the performance in a regime of subordination of labor, the organization, results, and risks of which fall exclusively within the sphere of the entrepreneur." Cass. July 28, 1956, n. 2944. *Cf.,* 1957 Giustizia civile, I, 170; and 1956 Foro it., Rep. v. *Agenzia,* n. 10.

"The existence of a relation of *agenzia,* which presupposes in the *agente* a sphere of autonomy with its own organization and risks must be excluded and instead a subordinate work relation admitted, in the nature of employment, when there occur the distinctive elements of collaboration and subordination, implying the inclusion of the one who furnishes labor in the enterprise administered by the principal, dependent on and under the hierarchical and technical-administrative supremacy of the latter." Cass. October 21, 1957, n. 4030; in 1957 Foro it., Rep., v. *Agenzia,* n. 12.

"The distinctive criterion between the contract of *agenzia* and subordinate work relation must be sought in the fact that the object of the contract of *agenzia* is the development of an organized and autonomous economic activity at the risk of the *agente,* which is materialized in the result of the work and is connected with the principal by a stable relation of collaboration, while the object of the labor relation is the hiring out of labor energy in a relation of subordination, the organization, results, and risk of which fall exclusively within the sphere of the entrepreneur." Cass., July 19, 1958,

It is clear, in the light of this definition, that those peculiar categories of individuals that dedicate themselves to a professional activity of this nature in connection with particular commercial activities, represent applications or subspecies of this generic type.[16]

The autonomous character of the enterprise and the exclusion of the bond of subordination and of an employment relation become more obvious and clear when the *agente* is a commercial society.[17] The character of autonomous enterprise admits also a type of *subagente*[18] and, finally, may have as a consequence that, in the last resort, the *agente* may incur a declaration of bankruptcy.[19]

3. The *agente* now having been legislatively conceived as the proprietor of an autonomous enterprise, while distinctions between this category and all the other types of auxiliaries in subordinate relation to an enterprise are easily set out, the possibility of precise delimitation of this contract from that of mediation has become more involved. More-

n. 2651; *cf.*, 1958 Massimario della giurisprudenza del lavoro, 250, Foro it., Rep., 1958, v. *Agenzia*, n. 8.

"There exists the hypothesis of the *agenzia* contract but as yet not that of a subordinate work contract whenever the commercial *agente* or creator of business carries on his activity in full autonomy, with a commission as compensation without the guarantee of a minimum wage and with the assumption on his part of the expenses and risks inherent in such activity." Cass., January 23, 1959, n. 178. *Cf.*, 1959 Foro it., Mass., 37. The holding is followed and confirmed by meritorious judicial decisions.

On the confusion of the contract of *agenzia* with the contract of subordinate labor, *cf.*, also, Cass. May 19, 1958, n. 1640, *ivi*, 249, 1958 Foro it., Rep., v. *Agenzia*, n. 23. *Cf.*: App. Firenze, March 31, 1958, 1958 Giurisprudenza Toscana, 433; App. Torino, March 13, 1958, 1958 Foro it., Rep., v. *Agenzia*, n. 9; App. Trento, April 10, 1957, 1957 Rivista di diritto del lavoro, II, 532; app. Milano, October 30, 1953, 1954 Foro it., Rep., v. *Agenzia*, n. 6; App. Lecce, June 12, 1954, 1954 Foro it., Rep., v. *Agenzia*, n. 6; Trib. Milano, June 3, 1955, 1955 Foro it., Rep., v. *Agenzia*, n. 12–13; Trib. Roma, February 26, 1958, 1958 Foro Padano, I, 507; 1958, Foro it., Rep., v. *Agenzia*, n. 14, 15; Trib. Genova, December 19, 1959, 1960 Temi Genovese, c. 52; Trib. Milano, September 30, 1957, 1957 Rivista dei dottori commercialisti, 724 and 1957, Foro it., Rep., v. *Agenzia*, 16, 17; Trib. Siracusa, May 30, 1953, 1953 Giur. Siciliana, II, 152; Trib. Milano, January 23, 1956, 1956 Rivista dei dottori commercialisti, 156.

[16] Thus, the ship's agents (*raccommandatari*): The Law of April 20, 1949, n. 496, constituted in the Provincial Economic Councils lists or rolls of "authorized ship's agents (*raccommandatari*)" to be registered with firms to which Article 1 of the Law applies; that is to say "those who in the harbors and ports of the country by mandate of the owner, the captain, or the charterer of the ship are expressly authorized to deal with the maritime operations of the ship, the acquisition or the consignment of cargoes, and the reservations of passengers. The present law does not apply to offices or branch offices of maritime firms that operate with their own personnel, which perform services of navigation on the basis of a convention with the state and over which the state exercises direct control." Later on, a collective agreement was concluded for this category on November 10, 1941, published by Governmental Decree on November 10, 1942, n. 1386.

[17] *Cf.*, Cass. April 9, 1937, n. 1942, 1937 Giur. it., Mass., 280.

[18] Trib. Torino, May 24, 1956, 1957 Riv. dir. comm., II, 63; App. Milano, June 25, 1954, 1954 Foro Padano, I, 1241; App. Lecce, January 21, 1953, 1953 Corti Bari, Lecce e Potenza, 27.

[19] App. Catania, December 3, 1955, 1956 Giur. it., Rep., 1065; Trib. Firenze, January 18, 1952, 1952 Giur. it. Rep., 871; Trib. Firenze, February 2, 1951, 1951 Giur. it. Rep., 871.

over, the differentiation of mediation from that of other legal relations that are in various respects similar,—precise enough in current doctrine and in the more recent codifications—has not always been made with equal clarity in the past. The reason for this has been above all the fact that much legislation—including the former Commercial Code of 1882—faced with a still inadequate elaboration of the legal relation of mediator, instead of devoting a section to mediation as to other contracts, provided for mediation only within the framework of the rules for the activities of mediators as auxiliaries of the merchant.

With the gradual elaboration of this category of mediation in the doctrine, liberating it from the detailed regulation, for the most part administrative, of the activities of mediators, practice proceeded to create and legislation adopted other contractual types, similar in their field of practical application, but far from similar in their legal structure and function, such as the contract of *agenzia* which, unknown to the Commercial Code of 1882, was developed in the projects of Vivante, D'Amelio, and Grandi, and effected its entry into our Civil Code of 1942.

In truth, the categories of 'mediator,' 'commercial *agente,*' sharing their characteristic autonomy—in contrast to all the dependent auxiliaries—can have common features in their exterior manifestations, in some cases to an extent leaving one who merely makes a superficial examination of the relations in question in perplexity; not however the jurist accustomed to subtle enquiry and, it might be said, to differential diagnosis as it were, of the diverse contractual types.

As a starting point, a relatively general phenomenon can be observed: in a simple relation (most frequently a sale), between two parties between whom in the last analysis the economic relation is concluded, a third party is present, whose function, however, profoundly differs in the varied contractual types reviewed above. Setting to one side the *nuntius,* who is no more than a simple means to transmit the contractual intent of one of the parties, and the *seller with exclusive right,* who, having acquired or holding on consignment (the so-called contract-at-estimate) the goods of a producer,[20] sells them, on his own account and in his own name, in the zone for which he is recognized as having a sole right, in all the other types there is present a work-activity directed to procuring, on another's behalf, the conclusion of contracts.

While in the *mandate* "one party is under an obligation to perform one or more legal acts on behalf of another" (art. 1703 cod. civ.)—(this contract however being distinguished from that of letting out

[20] "The contract thus described of exclusive representation should legally qualify as a contract of administration in which the "exclusive stipulation" constitutes an entirely accidental element." App. Milano, July 5, 1955, 1955 Giur. it. Rep., 2898. *Cf.,* Trib. Firenze, May 5, 1955, 1955 Giur. Toscana, I, 632.

services and of letting out work, which may have as content an activity of a more or less elevated order, but never the performance of legal acts)—the commission is, in substance, a mandate, but having as its specific object the making of purchases or sales, *always in the name of the commission-agente,* even if on the customer's account (art. 1731 cod. civ.).[21] It is clear that the mediator, who does not perform the negotiation in his own name, certainly cannot be confused with the commission-*agente.*

But while certain legal systems, like the Swiss, (CO art. 412), conclude by confusing the two types, the mediator is not even a mandatary, neither of one nor of both the parties between whom the contract is to be concluded through his interposition, as has been contemplated by a certain doctrine which makes him a quasi depository of the consent of both contracting parties.

The mandatary acts on behalf of and sometimes in the name of the mandator—in this last hypothesis he even issues a declaration of intent which puts the contracting party directly under an obligation—while the mediator, after facilitating the reaching of consent and agreement on performance and individual clauses, withdraws, so that the definitive agreement may be made directly between the interested parties.[22] Again, the mandatary acts on behalf of one of the future contracting parties: his work is to accomplish the objective of the mandator while the mediator is equally independent of both parties between whom the negotiations take place and the contract is to be concluded.[23]

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[21] Cass. May 10, 1958, n. 1546, 1958 Giur. it., Mass., 1958; App. L'Aquila, November 26, 1952, 1953 Rivista giuridica abbruzzese, 52; App. Milano, August 4, 1953, 1953 Foro Padano, II, 68.

[22] The jurisprudence of the Supreme Court has, for some time, definitely fixed this point. "The mediator operates during the negotiations to remove the obstacles and difficulties arising from the conflict of interests, while the mandatary states the intention of the principal and endeavors to bring about the conclusion of the matter, in the name of and on behalf of the same principal": Cass. May 31, 1940, n. 1790, 1940 Foro it., Rep., 1037.

[23] "Among the most salient points of difference between mandate and mediation are the interest on behalf of which the intervention is made and the moment in which the activity occurs: in mediation, the mediator is concerned with the interests of both parties, while the mandate is undertaken in the interest of only one of them": Cass. May 31, 1940, n. 1790, *loc. cit.*

"There is mandate and not mediation when the charge of transacting business is entrusted in the exclusive interest of one of the parties": Cass. January 12, 1940, 1940 Foro it., Rep., 1037.

"While the mandatary acts on behalf of and in the interest of only one of the parties, the mediator acts in the interest of both future contracting parties, operating by means of persuasion, in order to induce them to complete the contract": Cass. July 18, 1941, n. 2238, 1941 Foro it., Rep. 990; *cf.* Cass, December 16, 1941, n. 2940, 1941 Foro it. Rep., 991.

"In the contract of mediation, which is concluded only when the interposition has been accepted by both parties to the main contract, the intervention of the mediator must be impartial and neutral, such requisite constituting the characteristic element

Neither can mediation be identified—as has been said—with a contract of letting out services (*locatio operarum*), because the mediator does not hire out his own services and his own work-activity in a subordinate relation, but he makes available the useful result of his work. The characteristic elements of the Roman *locatio-conductio operis,* therefore, are presented, except that this entails an original obligation to accomplish a determined result, while the mediator has no obligation to bring the matter to a conclusion and in fact does not guarantee completion thereof.

4. Since, both in mediation and in *agenzia,* we are concerned with a person whose activity is to collaborate for the purposes of the commercial activities of others, remaining autonomous and himself sometimes an entrepreneur, the distinction between the two types, mediation and contract of *agenzia,* is now placed on the firm ground of the written rules.

Article 1742 of the new Civil Code defines contract of *agenzia* as a contract by which "one party assumes permanently the responsibility of promoting on behalf of the other, against payment, the concluding of contracts in a specified zone."[24]

Article 1754 of the new Code,—(which is also the first article in Chapter XI of Title III of Book IV containing the regulations "Of Single Contracts" and as such implicitly incorporating mediation among the contracts), not wishing to make a complete break with tradition, nor expressly to resolve the extensively debated question whether mediation truly is a contract, departs from the practice in all other chapters of declaring the contractual nature of the relation which is regulated and of defining its content,[25] stating: "The mediator is one who puts in relation two or more parties for the conclusion of a business transaction, without being bound to any of them by relations of collaboration, dependence, or representation."

From the two definitions, which aptly represent the point reached in Italian doctrine in the elaboration of the two categories, the dif-

that distinguishes mediation from mandate; however, there is no relation of mediation but of mandate, in case a person acts in the interests of only one of the parties": Cass., July 21, 1945, n. 592, 1946 Foro it., I, 107.

[24] It was already stated in the Collective Agreement of 1938: "The commercial *agente* is one who is permanently charged by one or more firms to promote the conclusion of contracts in a determined zone; the commercial representative is one who is permanently charged by one or more firms to conclude contracts in their name in a determined zone."

[25] Thus, the system was confirmed that, followed also for *agenzia* in the preparatory stage, was abandoned only in the final draft that was enacted as the Code. On the contractual nature of mediation the jurisprudence of the courts is fairly firm:" Mediation is a contract: because nobody owes any compensation to the mediator who declared beforehand that he does not intend to pay any remuneration:" Cass. May 16, 1956, n. 1640, 1957 Foro Padano, I, 1234 and 1957 Foro it., I, 852; App. Torino, January 10, 1956, 1956 Foro it., Rep., 1744; App. Trieste, October 30, 1956, 1956 Rivista di diritto del lavoro, II, 394; App. Milano, November 29, 1949, 1950 Foro Padano, II, 8.

ferences appear slight, as also appears from the characteristic features of mediation that we can cull from the more recent treatise-writers, Italian and foreign.[26]

From which it follows:

A. The contract of *agenzia* arises as a bilateral contract in which one of the contracting parties ***binds himself*** to promote business transactions on behalf of the other, and to this he ***binds himself*** for compensation:[27] while in mediation the mediator ***is free*** to furnish his own services, and, correlatively, the right of the mediator to a commission arises only as a result of and at the moment of the completion of the matter concluded through his intervention.

Tumedi emphasizes "the absolute liberty enjoyed by the mediator of not initiating the transaction that he has been charged to accomplish, of interrupting it or abandoning it at any stage whatsoever of the negotiations, at his pleasure. By not initiating it or by abandoning it, he incurs no other penalty than loss of the commission."[28]

"The mediator is not charged with an obligation but simply with an onus of performing the work that has as its purpose the concluding of business, in order to gain commission": (Cass., 4 March 1948 n. 344).[29]

Consequently, the *agente* who through fraud or even only through omission does not perform or improperly performs his own work, neglecting to conclude transactions or concluding them improperly, or not giving notice to the principal of the impossibility of executing his responsibility (art. 1747 cod. civ.), is contractually liable to the person to whom he has engaged his own activity, and will have to answer for the damages. The same cannot be said of the mediator,[30] who is under no obligation to anyone to bring transactions to a conclusion and may remain idle; he will be answerable only if, having performed his own service, on the business being completed, one of the contracting parties should complain of damage on account of the way in which his work was carried out, in violation of the regulations to which the mediator must conform, as, for example, by not having communicated facts known to him, pertinent in evaluating the suitability of the deal (art. 1759 cod. civ.), or not having authenticated the signatures of the parties, or having failed to observe,—if a professional mediator—the duties provided by express regulations (art. 1760 cod. civ.).

B. The commercial *agente,* as respects the parties between whom the contract is entered into, appears as ***much bound to one as he is au-***

[26] *Cf.,* Azzolina, La mediazione, Torino, 1943, p. 13; 1 Düringer-Hachenburg, Das Handelsgesetzbuch, Berlin (3rd ed.) 1932, p. 713.

[27] App. Milano, April 21, 1952, 1952 Foro Padano, I, 1081.

[28] *Cf.* "Del contratto di mediazione," 1923 Riv. dir. comm., I, 138.

[29] *Cf.,* 1949 Foro it., I, 961.

[30] *Cf.* App. Genova, March 23, 1946, 1946 Temi, 658, 1947 Foro it. Rep. v. *Mediazione,* n. 17; Trib. Bologna, April 18, 1952, 1953 Temi, 152 and 1953 Foro it., Rep. 1489.

*tonomous as regards the other.* Clearly, this does not import dependence such as derives from a relation of subordination, which does not exist in the case of the *agente* nor in that of the mediator—as distinguished from dependent auxiliaries—but rather from the obligation that is based on the confidence that the principal places in the *agente* as his collaborator, and as promoter of his interests.

However, the *agente* is bound to follow the instructions of the proponent, to furnish him with information concerning the state of the market in the zone assigned to him and any other information useful to the proponent to estimate the expediency of individual transactions (art. 1746 cod. civ.).

The position of the mediator is quite different as regards the two parties between whom by his intervention the contract is concluded. As it were, he is placed ideally at an equal distance from the one and the other: it is to both parties that he must communicate impartially the facts known to him relevant to evaluate and to assess the security of the transaction, and which may affect its conclusion (art. 1759 cod. civ.).[31] The principle is not peculiar to Italian and German law.[32]

[31] "Er hat sich (i.e. the *agente*) in den Dienst desselben (i.e. the party) zu stellen. Gerade hierin liegt eines der wichtigsten Unterscheidungsmerkmale des Handelsagenten vom Handelsmakler. Letzterer vermittelt objektiv. Er dient grundsätzlich beiden Parteien, die er zu einem Geschäftsabschluss zu vereinigen sucht, und ist beiden verantwortlich. Sein Pflichtenkreis daher ist von vornherein inhaltlich von dem des Handelsagenten wesentlich verschieden." 1 Düringer-Hachenburg, *op. cit.* I, 84, Ann. 7.

"The characteristics distinguishing the mediator and the creator of business are the following: the mediator is a neutral intermediary; he brings the parties together and acts disinterestedly for these very parties. The creator of business, on the other hand, carries out his activity in conformity with the mandate of the company for which he works and in the exclusive interest of the same." Cass. May 23, 1939, n. 1742, 1939 Foro it. Rep., 1181.

"The essential element of the contract of mediation is the disinterested and neutral interposition of the mediator between the conflicting interests of the parties, and even if he be required by only one of the parties to investigate the matter and to act as intermediary, his activity will not be unilateral and directed with partiality to the advantage of one side only, an element which otherwise excludes mediation, giving rise to mandate or commission"; Cass., April 26, 1940, n. 1325, 1940 Foro it. Rep., 1037.

"The incompatibility, as contemplated by article 1754 cod. civ., between the relation of mediation and those of collaboration, dependence, or representation, cannot be explained by the intent to avoid duplication of relations and rewards but is justified by the lack of autonomy and independence in the collaborator bound to one of the parties, whose activity does not, therefore, by presumption of law, occur in the necessary conditions of impartiality that are required for the mediator": Cass., October 4, 1957, n. 3602, 1958 Foro it., Rep. 1588.

"The stipulation, in favor of the mediator, of a special reward for the possible improvement of the business mediated, is not, in its general aspect, irreconcilable with the impartiality by which the relation of mediation must be characterized." "Such a principle is not, however, applicable in the case when the stipulation between the mediator and one of the parties, exceeding the limit of an ordinary *agenzia,* contains the premise of a special reward, of such nature and amount as necessarily binds the interests of the mediator to that of a single party and presupposes between the two a real relation of association which cannot be reconciled with the character of the mediator in accordance with the concept given it by article 1754 cod. civ." Cass. May 29, 1957, n. 1978, 1957 Foro it. Rep., 1601.

C. In the contract of *agenzia,* the *agente,* although acting independently and not as an employee, unlike the mediator, is subject in a lasting and continuous relation[33] to the entrepreneur whose business he must promote.

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"The relation of mediation subsists entirely independently of the prior agreement of the parties on the person of the mediator as well as of the bilateral conferment of the assignment. Mediation involves a real and impartial interposition of the mediator between the parties to the business, which is realized in the performance of an activity directed towards bringing about its completion and which has been accepted, even if tacitly, by the contracting parties (the which creates a negotiable instrument.)" Cass. November 6, 1956, n. 4154, 1956 Foro it., Rep. 1742.

"Article 1754 cod. civ. is based on the presumption *iuris et de iure* that he who is bound by relations of collaboration, dependence, or representation to any of the parties, does not possess the necessary conditions of impartiality to perform the work of the mediator. In order that such incompatibility may exist *ex lege* it is necessary for said relations to have been ascertained, but proof thereof must be furnished by whoever alleges their existence." Cass. March 30, 1951, n. 723, 1951 Foro it. Rep., 1378.

"Disregarding the unilateral or bilateral nature of the office, the relation of mediation consists in impartial and neutral interposition between two persons to facilitate the completion of a specific transaction; if one of said terms be removed, then it is not loss of commission which is under discussion, but the nonexistence of mediation: collaboration, dependence, or representation as regards one of the parties interested in the completion of the transaction reduces the independence, autonomy, and neutrality with which the work of the mediator must be characterized, and excludes mediation." Cass., December 21, 1950, n. 2805, 1951 Giurisprudenza completa della Suprema Corte di Cassazione, Sez. civ., Vol. XXX, I, quadr., p. 177 and 1950 Foro it., Rep. 1315.

"The element that characterizes the activity of the mediator and the distinction between mandate and hiring out services, is impartiality between the two future contracting parties, both liable to pay commission, independently of who initiates the deal." Cass., April 9, 1949, n. 844, 1949 Foro it., Rep., v. *Mediazione,* n. 7-8.

"The law presumes *iuris et de iure* in article 1754 cod. civ. that the conditions of impartiality necessary for the performance of the work of the mediator are not present when whoever intervenes to bring a transaction to a close is bound by relations of collaboration, dependence, or representation to one of the contracting parties." Cass., April 29, 1949, 1949 Nuova rivista di diritto commerciale, 125 and 1949 Foro it., Rep., 1943–45, v. *Mediazione,* 16.

"The work of interposition carried out by the mediator must be impartial and neutral, directed to bringing the parties together and to composing their differences so as to arrive at the completion of the desired main contract, and this condition of impartiality and neutrality cannot be represented as existing in the case where some person performs his work in the interests of one only of the parties." Cass., July 21, 1945, n. 592, 1944–46 Foro it., I, 107; *cf.,* Cass. July 28, 1943, n. 1954, *ivi,* 1943–45 Foro it., Rep., v. *Mediazione,* 16.

"The mediator works in the interests of both parties to the contract performing work of neutral interposition and of persuasion in order to bring them to the completion of the contract," and also "The relation of mediation is to be excluded when the work of interposition has not been performed in the interests of both of the future contracting parties." Cass. July 14, 1941, n. 2147, 1941 Giur. it., Mass., 867.

Neither do the courts of appeal deviate from these holdings. *Cf.* App. Torino, May 9, 1944, 1944 Giur. Torinese, 162 and 1943–45 Foro it., Rep., v. *Mediazione,* n. 23; App. Torina, April 14, 1950, 1950 Mon. Trib., 183; Trib. L'Aquila, December 31, 1951, 1952 Diritto e giurisprudenza, 108; App. Firenze, April 8, 1952, 1952 Giur. Toscana, 535; App. Catanzaro, May 13, 1955, 1956 Foro it., Rep., 1743; Trib. Napoli, March 4, 1955, 1956 Foro it., Rep., 1743; App. Firenze, June 9, 1950, 1950 Giur. Toscana, 309.

[32] *Cf.,* Tore Almen, 2 Das Skandinavische Kaufrecht, Heidelberg, 1922, p. 278: "er (der Makler) steht auch nicht zu dem einen Kontrahenten in einem näheren Verhältnis als zu dem anderen."

[33] *Cf.,* Cass. January 30, 1954, n. 251, 1954 Giur. it., I, 1, 605; App. Milano, May 29,

The mediator acts on his own initiative, from time to time determining the counterbalance of demands and offers: he negotiates and is in position to conclude other transactions also between the same persons, and with others in which one and the same person participates, but in every case each relation is autonomous and distinct.

The *agente* on the contrary negotiates several deals in favor of whomever has nominated him as such: whoever intervenes occasionally and for the completion of only one deal will never be an *agente*. It is precisely in this point, according to Vivante, that the essential characteristic of the commercial *agente* resides as contrasted with the mediator: "because they (the former) perform their activities permanently in the service of a dealer."[34]

D. But the contract of *agenzia* not only has continuity in time, but also presupposes a spatial element: the zone. The *agente,* in fact, is responsible for and performs his work within determined territorial limits, which can be more or less extended; within such limits he has a positive obligation to perform; outside such limits he is under an obligation not to perform his work.[35]

It has been disputed whether the zone must be considered as referring to the place of completion of the contract or to that of its *execution;* the second solution appears correct also under the provision in article 1748 which reserves to the agent the commission for business concluded directly by the promoter which must be *executed* in the zone reserved to the *agente.*[36]

The zonal concept is well-known. Normally, in the contract of *agenzia,* the *agente,* having to promote the business entrusted to him within one zone and drawing his reward from the business done, holds

1947, 1947 Temi, 548; App. Roma, April 12, 1957, 1957 Temi Romana, 672; App. Lecce, December 10, 1957, 1958 Foro it., Rep., v. *Agenzia,* n. 17; App. Trento, September 21, 1955, 1955–59 Giustizia Civile and 1956 Giur. it., Rep., 36.

[34] A *bond,* then, in case of the *agente,* a *permanent bond* that is wanting in that of the mediator, is clearly evidenced in the German Commercial Code, § 84 of which defines the *agente* as: "Wer, ohne als Handlungsgehilfe angestellt zu sein *ständig damit betraut ist* für das Handelsgewerb eines anderen Geschäfte zu vermitteln, oder im Namen des anderen abzuschliessen . . ." and § 93 which defines the mediator: "Wer gewerbsmässig für andere Personen, *ohne von ihnen auf Grund eines Vertragsverhältnisses ständig damit betraut zu sein* die Vermittelung von Verträgen über Anschaffung oder Veräusserung von Waren . . . übernimmt. . . ."

The mediator does not place his clients at the disposal of one placing an order, but utilizes his knowledge of the market to procure for these a contracting party. He is thus always responsible for single transactions. Naturally, this does not exclude—it is even the rule—that he should again be employed by the same client, who is satisfied with his prior services. But such a client relation, as the German Commercial Code clearly states, is utterly distinct from the permanent relation of obligation, peculiar to the *agente. Cf.,* Vivante, "Gli agenti di commercio e la conclusione dei contratti," 1921 Riv. dir. comm. I, 615; Molitor, "Sul concetto di agente di commercio," 2 Studi di diritto commerciale in onore di Cesare Vivante," Roma, 1941, p. 46.

[35] App. Palermo, June 18, 1957, 1958 Foro it., Rep., v. *Agenzia,* 20.

[36] *Cf.,* Giordano, *op. cit.,* p. 196.

*an exclusive right for the zone assigned to him,* which guarantees to him as a rule a commission also for business independently transacted by the promoter in the zone reserved to the *agente.*[37] (art. 1748 cod. civ.) Naturally, none of this applies to the mediator who, freely performing his work, receives reward only for business concluded as a result of his direct intervention. (art. 1755 cod. civ.)

However, while the *zone* is a characteristic element of the relation of *agenzia,* the same cannot be said of what, in the great majority of cases is also an evident characteristic of the contract of *agenzia:* exclusive right. The determination of a *zone* does not in fact necessarily call for a bilateral clause of exclusive right or of no competition between *agente* and principal. In practice, it is quite normal for the principal contractually to reserve to the *agente* a zone in which he can and must operate free from the competition of other *agenti* (which thus excludes a plurality of *agenti* in the same zone), just as it is quite normal for the *agente* to be bound, within the zone reserved to him, not to promote the interests of third-party competitors (even if it frequently occurs that for reasons of his company's economic exploitation an *agente* may, within the same territory, engage in noncompetitive business of his own or of other companies).

Indeed, article 1743 of the Civil Code establishing that: "The promoter may not avail himself contemporaneously of other *agenti* in the same zone, nor may the *agente* take on the responsibility of negotiating in the same zone and in the same trade the business of other companies in competition among themselves," would seem to make the reciprocal exclusive right between *agente* and promoter an essential element of the bargain. But in view of the normally revocable character of the purely patrimonial, and therefore disposable, effects of the transaction, and of the possibility that, even without this reciprocal exclusive right, the transaction may be accomplished without modification of its nature, it is to be held that the reciprocal exclusive right is rather a natural result than an essential element of the bargain. It is possible therefore for the promoter to be permitted to reserve to himself the use of other *agenti* in one and the same zone.[38] (Less easy will be a departure from the competition clause allowing the agent to negotiate in one and the same zone for competing companies.)[39]

[37] Cass. June 15, 1957, n. 2285, 1957 Foro it., Rep., v. *Agenzia,* n. 28; Cass. July 6, 1950, n. 1766, 1951 Giurisprudenza Completa del Suprema Corte di Cassazione-Sezione Civili, I, quadr., p. 86.

[38] App. Trieste, April 1, 1955, 1956 Foro it., Rep., v. *Agenzia,* n. 14; App. Firenze, January 20, 1956, 1956 Giur. Toscana, 595; App. Milano, March 14, 1952, 1952 Foro Padano, II, 28; App. Milano, December 12, 1952, 1953 Foro Padano, II, 5; App. Roma, July 17, 1956, 1957 Foro it., Rep., v. *Agenzia,* p. 20.

[39] The recently debated question here is of no interest on the value of such an exclusive clause with regard to third parties; a question which now seems to be solved, and well solved, by the Supreme Court, which has held: "In the present system of the

In the case of mediation, commission is chargeable to the party who requested it but *may,* according to law and practice, be divided between the two parties participating in the transaction (art. 1755 cod. civ.); in the contract of *agenzia,* the *agente* is even paid in advance, but this is never chargeable to others than the promoter who has entrusted the *agente* with the permanent responsibility of promoting his interests in a determined zone.[40]

Moreover, the *agente* has a right to commission only if the contract has been performed (art. 1748 code. civ.), or if nonperformance is due to the fault of the promoter (art. 1740 pr. cod. civ.), while the mediator has a right to commission if the contract is merely concluded.[41]

In consequence of the exclusive right, normally inherent in the contract of *agenzia* (art. 1743 cod. civ.), *the participation of other agenti is not admissible* in the accomplishment of one and the same transaction. On the other hand, several mediators may participate in the completion of one and the same deal, operating successively or contemporaneously, even independently, and consequently it is quite possible that a commission should be shared by numerous mediators, to be divided among them in proportion to their effective participation in the completion of the transaction (art. 1758 cod. civ.).

A special case is that of a group of concerns which, constituting a cartel, appoint an individual, or constitute an organization as common *agente:* (*Kommissionsagent* or *Agentkommission* of the Germans).

E. Given the *continuing* and bilateral *character* of the contract of *agenzia* from its inception, the contract may be for a determined or undetermined period, but in the latter case a *term of notice* of with-

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freedom of commerce, the circumstance that a producer stipulates in favor of a single enterpreneur an exclusive right to sell in a given zone may not violate the freedom of commerce of other entrepreneurs; the contract is only effective between the parties, and the possible knowledge of it by third parties is of no relevance to the exclusive rights clause": Cass. October 22, 1956, n. 3805, 1957 Foro it., I, 588. The same also in App. Milano, August 10, 1956, 1956 Rivista di diritto industriale, II, 461; App. Milano, February 17, 1956, *ivi,* 1956, II, 442; Trib. Milano, June 24, 1957, *ivi,* 1957, II, 184.

"The provisions of the Civil Code following article 1742 cod. civ., which govern the relations between promoter and *agente* apply only in the absence of a different intent of the parties and may be modified by such parties; therefore the bilateral assumption of the exclusive right to which by article 1743 cod. civ. the contract of *agenzia* is subject, is not a necessary and essential element of said contract but only a natural element, without which, however, the relation of *agenzia* may just as well exist." Cass. May 18, 1954, n. 3589, 1954 Giustizia Civile, I, 1135 and 1954 Giur. it. Mass., 362.

"Exclusive right, although being a normal requisite in the contract of *agenzia,* does not, however, constitute an essential element of it." "Should said right be excluded by the contracting parties, the *agente* cannot claim—relying on article 1743 cod. civ.—commission for business concluded directly by the promoter in the zone reserved to the same *agente.*" Cass. June 22, 1954, n. 2151, 1954 Giur. it., I, 1, 349.

[40] *Cf.,* Cass. May 20, 1954, n. 1616, 1954 Giur. it., I, 1, 983; Cass. April 27, 1955, n. 1169 (ined.), 1955 Foro it., Rep., v. *Agenzia,* n. 16; App. Milano, November 14, 1958, 1958 Foro Padano, II, 77; Trib. L'Aquila, December 31, 1951, 1952 Rivista giuridica abbruzzese, 52; Cass. July 6, 1950, n. 1766, 1950 Giur. it., Mass., 433.

[41] Cass. October 6, 1954, n. 3333, 1954 Foro it., Rep., 1685.

drawal is included, and, even if it is for an undetermined term, the promoter who withdraws has an obligation to indemnify the *agente* (arts. 1750, 1751 cod. civ.)[42] The same holds for the *agente,* who cannot arbitrarily bring the contract to an abrupt end.[43]

The mediator, on the contrary—who is a free professional—is not subject to the fixing of a term for his work, and even less a right of indemnity for withdrawal, because, until his intervention in the individual case is effectively accomplished, no right accrues to him, and, his service once accomplished in the transaction, any relation between him and the contracting parties in the deal procured by him is at an end, and the parties are free not to avail themselves further of his services.

F. The mediator, finally, can never conclude the contract in the name of and on behalf of a client,[44] while the *agente* can be given representation,[45] representation that the law itself, within quite circumscribed limits, recognizes, (art. 1745 cod. civ.).

5. The principles stated clarify how the practical problems of the characterization of a relation may be resolved, and what are the *assured differential criteria* between the two contracts of *agenzia* and of mediation, facilitating their application in concrete cases.

While the fact that the intermediary has not concluded the transaction in the name of and on behalf of the seller does not of itself allow one to affirm that mediation is in question, because this also is compatible with the category of *agente;* while provision for commission

[42] Cass. August 19, 1950, 1951 Foro it. I, 1219; Cass. November 9, 1957, n. 4318, 1958 Foro it., I, 563; Cass. November 9, 1956, n. 4318, 1957 Foro it. Rep., v. *Agenzia,* n. 37–38; Cass. July 9, 1956, n. 2537, 1956 Foro it., Rep., v. *Agenzia,* n. 24–25; Cass. July 6, 1953, n. 2139, 1955 Rivista di diritto del lavoro, II, p. 11; Cass. August 19, 1950, 1951 Foro it., I, 1219; App. Torino, March 31, 1958, Foro it., Rep., v. *Agenzia,* n. 25; App. Napoli, March 27, 1958, 1958 Giustizia civile, I, 929.

[43] If the contract of *agenzia* made for an indeterminate period is dissolved by the resignation of the agent without any just reason, there is no indemnity due to the agent according to article 1751 Cod. Civ.; neither is indemnity provided in article 12 of the Collective Agreement of June 30, 1938." Cass. July 5, 1954, n. 2341, 1954 Giur. it., I, 1, 897.

[44] Naturally, the mediator is without professional qualification if a certain contract has as its objective to prevent him from being the mandatary and also the representative of one of the contracting parties.

"It is not forbidden to a professional mediator to act as the representative and the mandatary of one of the contracting parties for the purpose of concluding a certain contract and it will be a question of proof to determine in whose behalf he has acted." Cass. August 5, 1947, n. 1431, 1947 Foro it. Rep., v. Mediazione, n. 15.

[45] Cass. April 15, 1959, 1959 Foro it., Mass., 205; Cass. May 20, 1959, n. 1512, 1959 Foro it., Mass., 283; Cass. July 5, 1957, n. 2633, 1957 Foro it., Rep., v. *Agenzia,* n. 11; Cass. July 6, 1955, n. 2086, 1955 Foro it., Rep., *Agenzia* n. 15; Cass. January 23, 1952, n. 187, 1952 Giurisprudenza cassazione civile, Quadr. I, 198; Cass. September 30, 1954, n. 3166, 1954 Foro it., v. *Agenzia,* n. 9; Cass. October 14, 1947, n. 1605, 1947 Foro it. Rep., v. *Agenzia* n. 3; App. Genova, December 31, 1955, 1956 Temi Genovese, p. 23; App. L'Aquila, June 18, 1957, 1957 Foro it., Rep., v. *Agenzia,* n. 19; App. Firenze, June 12, 1958, 1958 Foro it., Rep., v. *Agenzia* n. 18; Trib. Roma, January 15, 1954, 1954 Temi Romana, p. 210; App. Firenze, March 22, 1951, 1951 Giur. Toscana, p. 190; App. Venezia, July 31, 1956, 1957 Foro it., Rep., v. *Agenzia,* n. 18–19.

does not justify an affirmation that mediation is involved, because this form of reward can be compatible with the contract of *agenzia* and with other contracts as well; while participation of a single person in the function of intermediation cannot be a sure sign of the contract of *agenzia,* because in the case of mediation the co-operation of numerous persons is exceptional, but nonetheless possible: there are, nevertheless, elements otherwise quite certain for determining in the concrete case the nature of the relation under consideration.

Whenever therefore the question is to determine—for this is the practical problem—what character a party assumes in a determined concrete relation, the solution may be reached through the answers to the following questions: Was the party—entirely excluding any bond of subordination—originally bound in a contractual relation that obliged him to provide services and made him liable had he desisted in breach of duty from such work? Had he a precise obligation to perform, to be relieved from which he would have had to obtain from the opposite party rescission by consent, or could he withdraw without consequences other than that of losing the commission? In the first hypothesis, an *agente* would be present, in the second, a mediator would have to be recognized.

Was the party bound by a tie that constrained him to act under the direction of a specific company, acting in its interests, bound to inform it, and it alone, of all the elements that would serve to create sound business, or did he, having sought to interest a concern in the possibilities inherent in certain goods, maintain an autonomous position in respect of the two parties to the contract, informing them with equal impartiality of the elements pertaining to the contract, so as to bring demand and offer together, and thus arrive at the definitive conclusion of the contract? In the first case an *agente* would be present, in the second a mediator.

Was the party under an obligation to negotiate business of a specific firm alone and was he, above all, under an absolute prohibition to negotiate any business of its competitors, or was he freely able to negotiate business whenever the opportunity presented itself? In the first case, we would have to do with an *agente,* of which exclusive right is a normal, if not essential element; in the second, we should be obliged to assume the existence of a relation of mediation.

Had a specific concern reserved to the party an exclusive right zone of greater or less extent, in which the former might not effect sales, directly or indirectly, without allowing a commission also for these sales, or might the concern freely effect sales in the same market directly or through an *agente,* or by the intrusion of mediators? In the first case, the relation will appear *de quo* a contract of *agenzia,* but in the second, given the precise definition of our Code, such contract will be excluded and mediation will occur, for the ever-present reason that exclusive right—natural in *agenzia*—is certain to be absent in mediation.

J. GILLIS WETTER

# Swedish Antitrust Law

This paper presents a review of Swedish antitrust law, with particular emphasis on the case law which has evolved after the enactment of the first antitrust statute in 1953. The provisions on restrictive business practices which have been included in the Convention Establishing the European Free Trade Association (EFTA), of 20th November, 1959 (particularly Article 15), may in all probability influence the future development of Swedish antitrust law, but it is as yet too early to foresee when and how this influence will make itself felt, and furthermore, since material which might elucidate the treaty provisions is virtually nonexistent, a mere reference to them may suffice in this context.[1]

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*Cf.* the following documentation and notes in English on Swedish antitrust law: Neumeyer, Swedish Cartel and Monopoly Control Legislation, 3 Am. J. of Comp. Law (1954) 563–67; Bolin, Chapter on Sweden in Anti-Trust Laws: A Comparative Symposium (ed. W. Friedmann), London, Stevens & Sons Ltd., 1956, 319–339; the OEEC publication Guide to Legislation on Restrictive Business Practices, Volume II, section on Sweden (Paris, 1960); the United Nations documentation referred to *infra* in footnotes 12, 15 and 17; and the brief summaries in English of the investigations of the Price and Cartel Office lately included in the periodical, Pris-och kartellfrågor.

See further Jägerskiöld, Lagstiftningen mot karteller och konkurrensbegränsning, 21 Förvaltningsrättslig tidskrift 101–124 (1958); af Trolle, Om lagstiftning mot prisdiskriminering (with an English summary), Företagsekonomiska forskningsinstitutet vid Handelshögskolan i Stockholm, Meddelande No. 31 (Stockholm, 1950) viewed as background to his article Om prisdiskriminering; Ett aktuellt juridiskt och distributionsekonomiskt problem, Ekonomiska och juridiska studier tillägnade Hadar Berglund, Gothenburg School of Economics, Publication 1956/1, 37–45; af Trolle, Bruttoprisförbudets grundval och verkningar, 57 Ekonomisk tidskrift 1–24 (1955); Malmström, Om offentlighet och sekretess kring kartellproblemen, 58 Statsvetenskaplig tidskrift 185–198 (1955), *cf. id.* 382–391; Brems-Lindström-Nordenson-Rydström-af Trolle-Wallander, Konkurrens eller samverkan (Stockholm, 1951). Brief, popular guides to the legislation appear in Martenius, Friare konkurrens, Den nya kartellagen (Stockholm, 1953) and Widesheim-Paul, Den nya pris-och kartellagstiftningen, En kortfattad översikt (Stockholm, 1959). *Cf* also Holmberg, Kartellrättsliga utvecklingslinjer, 22 Förvaltningsrättslig tidskrift 331–347 (1959).

The most important source of information on Swedish antitrust law is an official Government periodical on antitrust and price matters which has been issued under various names since 1947; Kartellregistret (KR, 1947–1954), Näringsfrihetsfrågor (NFF, 1955–1956) and Pris- och kartellfrågor (PKF, 1957 ff.).

[1] The EFTA treaty has been published in England by H.M. Stationery Office as Cmnd. 906 (1960), seemingly also as Cmnd. 1026; the text of the treaty and comments on its provisions are likewise incorporated in the Swedish Government's Report to Parliament, Kungl. Maj:Ts prop. 25/1960. To my knowledge, only one legal analysis has been published on the antitrust articles in the treaty, *viz.* Andrew Martin, Restrictive Trade Practices in the European Free Trade Association, Int. & Comp. L.Q., Supplementary Publication No. 1 (1961), 89–98.

## I. HISTORICAL SUMMARY

The first reactions of the Swedish Government to monopolies, cartels, and restrictive trade practices occurred nearly a half century ago when, in 1912, the Cartel and Trust Commission (*kartell- och trustutredningen*) was instructed to investigate existing trusts and cartels. However, this first move in the direction of antitrust control resulted only in a study of the sugar industry, including the question of sugar taxes in Sweden and certain other countries.[2]

The Customs Duties and Treaty Committee (*tull- och traktatkommittén*), appointed in 1917, made a limited inquiry into the extent before World War I of monopolistic associations and the effects on the economy of their activities.[3]

A new Commission, the Trust Legislation Commission (*trustlagstiftningskommittén*), was appointed in 1920 for the purpose of "proposing interim legislation on investigation and control of trusts and other monopolistic associations in industry, trade and transportation"; its Report was published in the following year.[4] Despite the fact that the Commission had been requested to complete their Report urgently, no legislation was passed until 1925, when the Law on Investigation of Monopolistic Enterprises and Associations was enacted.[5] This Law authorized measures more lenient than those recommended by the Commission, for it provided merely that the Government might, if this seemed to be called for, order *ad hoc* investigations to be made of particular enterprises or associations of a monopolistic character in

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Delegates to the Nordic Council proposed at its recent 9th Session that the Scandinavian countries make a joint study of what measures should be taken to implement the EFTA treaty provisions in Scandinavia. *Cf.* Utl. av Näringsfrihetsrådets ordf. till Nordiska Rådets presidium . . ., PKF 1961, 139, in which the Chairman of the Freedom of Commerce Board stated that Scandinavian co-operation in this matter would not seem to be called for, since the problems should be solved nationally within the framework of EFTA (*id.*, at 142). The Board, in another recent *remissutlåtande*, has added that

> ". . . the Board wishes to add that the [EFTA] treaty in no way seeks to achieve or presupposes that member countries should adopt uniform antitrust laws. If this aim is not changed, it seems that Sweden only needs to eliminate certain minor legal differences between our internal legislation and the provisions of the treaty."

(Näringsfrihetsrådets yttr. till Chefen för Handelsdep. över SOU 1961: 3, PKF 1961, 142, at 143.)

[2] Kartell–och trustutredningen. I. Sockerindustri och sockerbeskattning i Sverige samt Danmark och Tyskland. Utredning verkställd av inom Finansdepartementet tillkallade sakkunniga. (Stockholm, Isaac Marcus, 1913).

[3] See Tull–och traktatkommitténs utredningar och betänkanden XXXVI. Betänkande angående tullsystemets verkningar i Sverige före världskriget. Del I. (SOU 1924: 37).

[4] Trustlagstiftningskommitténs betänkande: Förslag till lag om vissa åtgärder beträffande monopolistiska företag och sammanslutningar. (Uppsala, Almqvist & Wiksell, 1921).

[5] Lag om undersökning angående monopolistiska företag och sammanslutningar (SFS 1925: 223).

order to ascertain their influence on price levels and trade.[6] The Law also conferred certain investigatory powers on the authorities that might be entrusted with carrying out investigations. On the basis of this Law, inquiries were made concerning the mills, the oil companies and the manufacturers of yeast, sugar and chinaware.[7]

In 1936, a Committee was appointed for the purpose of investigating to what extent organized co-operation existed in private enterprise and how such co-operation influenced price, production, and distribution policies. The Committee was requested to propose such measures as their investigation would seem to call for. Their extensive Report was published in 1940.[8] Since this Report was not completed until after the outbreak of World War II, the Committee, apart from publishing a thorough review of actually existing private enterprise measures in restraint of competition, did not present detailed proposals for new legislation but only made general recommendations[9] which were not acted upon by the Government.

Immediately after World War II, a Commission charged with forecasting and planning the development of the postwar economy was asked also to examine the matter of trust and cartel legislation; a brief Report on the subject was published in 1945.[10] This Commission, whose chairman was Professor Gunnar Myrdal, viewed their task as a continuation of the work of the 1936 Committee. It proposed that, as a first step toward control over monopolistic and similar tendencies in the economy, registration should be effected of existing cartel agreements, and government authorities should be empowered to investigate and publish facts concerning agreements, as well as other facts of like or similar character.[11] An Act with an accompanying Royal Proclama-

[6] Section 1.—The Commission proposed the institution of a permanent investigatory body which, if need be, should propose new legislation and advise the Government to take other measures if an enterprise or association abused its powers in a manner that resulted in unreasonable prices, provided that this effect had widespread importance. (See particularly section 7 of the proposed statute, *op. cit.* in note 4 *supra.*)

[7] See on mills 4/9 1926, Jordbruksdepartementets File No. 1762/1926; sugar production 16/11 1931, Riksdagens protokoll 1932, Bihang, Samling I, No. 76 Bil. C, 27–48; oil companies, Finansdepartementets handlingar 7/9 1933, No. 19; chinaware, Handelsdepartementets handlingar 9/4 1937, No. 1.

Mention should also be made of Mellanhandssakkunniges betänkande angående olägenheterna vid mellanhandssystemet inom livsmedelshandeln (SOU 1922: 20), in which antitrust matters were given incidental attention.

[8] Organiserad samverkan inom svenskt näringsliv. Betänkande avgivet av 1936 års näringsorganisationssakkunniga (SOU 1940: 35).

[9] See on the reasons for this attitude SOU 1940: 35, 319.

[10] Utredningar angående ekonomisk efterkrigsplanering XII. Framställningar och utlåtanden från kommissionen för ekonomisk efterkrigsplanering V: Betänkande angående övervakning av konkurrensbegränsande företeelser inom näringslivet (SOU 1945: 42).

[11] "The investigations which the new authority shall carry out ought to be of three different kinds. Firstly, it is necessary to continuously provide general analyses of market conditions aimed at clarifying structural developments in the Swedish economy and the

tion to this effect was promulgated in 1946,[12] under which the Monopoly Investigation Bureau (*monopolutredningsbyrån inom kommerskollegium*), a division of the Board of Trade, was charged with keeping a Cartel Register (*kartellregistret*) and was given extensive powers to solicit information from private enterprise for publication in the Register. In addition to the registration, the Bureau was instructed to prepare reports on the existence of restraints of competition where it might be suspected that such restraints entailed detrimental effects.[13] Information contained in the Cartel Register—which is at present kept by the Price and Cartel Office—has since been continuously published in summarized form.[14]

In 1946, the Commission on Establishment (*nyetableringssakkunniga*) was appointed to investigate particularly restrictions on establishment of new business, and it was later instructed also to prepare effective antitrust legislation. Their voluminous Report was published in 1951.[15] On the basis of this report—which in the course of the extensive consideration and scrutiny typical of the Swedish legislative process was severely criticized and modified[16]—the first Swedish antitrust law was eventually enacted in 1953; it is entitled Law to Counteract Certain Acts in Restraint of Economic Competition.[17]

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rôle that the limitations of free competition play in this regard. Secondly, up to date knowledge of facts pertaining to agreements in restraint of competition is required. Thirdly, detailed special investigations must be made in cases where there is reason to believe that restrictions of free competition are abused in a manner contrary to public policy or entail harmful effects." (SOU 1945: 42, 33).

[12] Lag om övervakning av konkurrensbegränsning inom näringslivet, 29th June, 1946, SFS 1946: 448; KK angående förordnande för kommerskollegium att utöva övervakning jämlikt lagen den 29 juni 1946 (No. 448) om övervakning av konkurrensbegränsning inom näringslivet, SFS 1946: 451. For translations of the Act and the Royal Proclamation, see UN Doc. E/2379/Add.2, E/AC.37/2/Add.2, 13th March, 1953, 187–188.

[13] Sections 6 *et seq.*

[14] *Cf.* on the activities of the Bureau, Neumeyer, 3 Am. J. Comp. Law (1954) 563 ff., who called the Bureau the Control Bureau and erroneously stated that it was a division of the Department of Commerce. See further the comprehensive report on the Cartel Register (1947–1957) by Modin and Sandberg, Registrering av konkurrensbegränsande överenskommelser, PKF 1958, 333–348.

[15] Konkurrensbegränsning. Nyetableringssakkunnigas betänkande med förslag till lag om skydd mot samhällsskadlig konkurrensbegränsning, 1–2 (SOU 1951: 27 and 28). The text of the statute proposed by the Commission on Establishment is translated in UN Doc. E/2379/Add.2, E/AC.37/2/Add.2, 13th March, 1953, 189–191.

[16] The controversy evoked by the legislative proposals of the Commission was marked and was resolved only through rather extraordinary bargaining between the Government and the business community. When private enterprise, being invited by the Government to suggest an alternative course, presented the idea of enacting legislation based on the principle of negotiation and voluntary co-operation on the part of business, the Department of Commerce, which was responsible for the drafting of the Law for submission to Parliament, deemed it necessary to secure "agreement" on the statutory text between the Government and the principal private enterprise associations and organizations: see Kungl. Maj:Ts prop. 103/1953, 97. This procedure did not fail to draw criticism in Parliament (*cf.* e.g., Andra lagutsk. utl. 32/1953, 54). When the scope of the Law was extended in 1956 (*cf.* the text below), an "agreement" of the same kind was secured by the Price Control Commission, see SOU 1955: 45, 134.

[17] Lag den 25 september 1953 om motverkande i vissa fall av konkurrensbegränsning

The Law of 1953 is still in force, but its scope was enlarged in 1956 as a result of proposals made by the Price Control Commission of 1954 (*1954 års priskontrollutredning*); their Report was published in 1955.[18] Whereas the Law of 1953 was originally applicable only to certain specifically defined types of restrictive business practices, even apart from those which were prohibited under sanction of criminal penalties, the 1956 amendments extended its scope to any restraints of competition which entail harmful effects.[19]

In connection with the enactment in 1956 of the amendments to the Law of 1953, the Act of 1946 was repealed, and a new Act, entitled Act Respecting Duty to Furnish Information on Facts Regarding Prices and Competition, was promulgated, together with a Royal Proclamation containing some detailed provisions on the same subject.[20]

## II. PRESENT LEGISLATION

1. *Legal Framework.* Under the Law of 1953, two types of restrictive business practices are prohibited under sanction of criminal penalties,[21] namely,

1. The requirement by a seller that a purchaser of a product who intends to re-sell it shall do so at a specified minimum price, or the

inom näringslivet, SFS 1953: 603. A translation of the text of this statute, as laid before Parliament, appears in UN Doc. E/2379/Add.2, E/AC.37/2/Add.2, 13th March, 1953, 191–193. See for the Swedish Government's comments on the 1953 Law also UN Doc. E/2671, December, 1954, 79.

[18] Konkurrens och priser. Betänkande avgivet av 1954 års priskontrollutredning (SOU 1955: 45). Another Government report with some bearing upon antitrust matters was published in the same year, *viz.* Pris och prestation i handeln. Varudistributionsutredningens betänkande (SOU 1955: 16).

[19] The only two situations in which, according to the original wording of the Law of 1953, negotiations might be instituted were those where either

1) As a result of a cartel or similar agreement concluded between entrepreneurs or an understanding between enterpreneurs, uniform practices were followed which affected prices, production, trade or transport; or

2) An entrepreneur or group of entrepreneurs joined together by common interests of ownership controlled a substantial proportion of the business in a particular branch throughout or in part of the country.

The elastic formula now in force is analyzed and commented upon *infra.*

[20] Lag angående ändring i lagen av den 25 september 1953 (No. 603) om motverkande i vissa fall av konkurrensbegränsning inom näringslivet (SFS 1956: 244); Lag om uppgiftsskyldighet rörande pris- och konkurrensförhållanden (SFS 1956: 245); KK med vissa föreskrifter enligt lagen den 1 juni 1956 (No. 245) om uppgiftsskyldighet rörande pris- och konkurrensförhållanden (SFS 1956: 519); Kungl. Maj:ts instruktioner för ombudsmannaämbetet för näringsfrihetsfrågor och statens pris- och kartellnämnd (SFS 1956: 510 and 511).

Adequate translations of the Law of 1953 and of the Act of 1956, both as now in force, as well as brief explanatory notes, appear in the chapter on Sweden in the OEEC publication, Guide to Legislation on Restrictive Business Practices, Europe and North America, Volume II (Paris, 1960).

[21] The regular courts have jurisdiction in criminal proceedings under the Law of 1953, but such offences may be prosecuted by the public prosecutor only at the request, or with the approval of the Freedom of Commerce Commissioner.

specifying of a price as a guidance to the establishment of resale prices unless it be clearly stated that a price lower than that price may be charged (*bruttoprissystemet;* section 2).

2. The entering into or implementing of an agreement stipulating that consultations or other forms of co-operation shall take place between different enterprises before any one of them submits a tender or bid for the supply of a commodity or the rendering of a service (*anbudskarteller;* section 3).

Aside from these two specific prohibitions—which may, however, be waived in exceptional cases[22] by the Freedom of Commerce Board (*cf.* on this institution below)—the Law of 1953 relies on a unique method of safeguarding the free interplay of competitive forces in the Swedish economy. The various Government authorities which have been responsible for the elaboration of Swedish antitrust law have never favored the idea of creating a set of rigid rules backed by criminal sanctions[23] but have instead devised what may be termed the method of

[22] Section 4, which reads:

"The permission specified in sections 2 and 3 may be granted only if the restraint of competition can be expected to result in lower costs, accruing substantially to the benefit of consumers, or otherwise to form part of a system which is expedient from a public point of view, or if there are other special reasons for granting such permission.

"The Freedom of Commerce Board may withdraw permission granted, in the event of abuse or if the circumstances under which it was granted have materially changed."

[23] The 1946 Commission on Establishment went rather far in this direction but nevertheless rejected a system analogous to US antitrust law where certain restraints of competition are illegal as such, without regard to their actual effects in each instance. The Commission stated that "it is out of the question to enact legislation to the effect that cartel agreements or other restraints of competition should be considered violations of the law without previous examination and evaluation in each case." (SOU 1951: 27, 492, *cf.* 523). The Commission proposed that cease and desist orders might be issued and that only deliberate disregard of such orders should entail criminal liability. Even this limited proposal was, however, rejected by the Government as a result of severe opposition on the part of private enterprise and others who scrutinized the draft legislation.

It deserves mention that, as intimated in note 16 *supra,* the proposals made by the Commission on Establishment were considerably modified in the legislative process. A comparison of their draft text of the key sections in the law and the rules that were ultimately adopted by the Law of 1953 readily so demonstrates.

Text proposed by the Commission (Swedish Government's translation):

"1. Official action may be taken in the manner prescribed by this Act with a view to preventing restraint of competition in Sweden contrary to the public interest in cases where:

"(1) A businessman, or a group of businessmen joined together by common interests of ownership or other similar motive, controls a substantial proportion of the business in a particular branch;

"(2) Businessmen co-operate on the basis of a cartel arrangement or other agreement, or by tacit consent follow a uniform procedure;

"(3) Businessmen in the conduct of their sales operations issue instructions concerning the minimum prices for the resale of commodities.

negotiation for eliminating harmful effects of restrictions on free competition. The three essential elements of this method are general and specific fact-finding based on far-reaching powers under the Act of 1956 to demand disclosure of documents and facts, publicity,[24] and informal negotiations aimed at preventing or eliminating undesirable practices, conducted between permanent Government institutions and those responsible for acts that in one way or another restrain free competition.

Government action against restrictive business practices presupposes fact-finding activities which to a large extent must be based on documentation in company archives or on information provided by business executives or others concerned. A preliminary statement should therefore be made on the Act of 1956 which confers investigatory powers on those Government institutions which from time to time are entrusted with the fact-finding. Under the Act, anyone engaging in business[25]—apart from the duty to submit upon request the text of agree-

"2. With His Majesty's consent, official action may also be taken in the cases referred to in paragraph 1 of this article with a view to preventing restraint of competition contrary to the public interest outside Sweden. Such consent may be given only if required under agreements with foreign States. (section 4).

"Unless investigation provides reason for a contrary presumption, restraint of competition shall be deemed to operate against the public interest when

"(1) A businessman or group of businessmen, as referred to in article 4, paragraph 1 (1), discriminate in the conduct of their sales operations against one or more other businessmen;

"(2) A cartel arrangement, or other agreement or procedure, as referred to in article 4, paragraph 1 (2), provides for concerted action with regard to price-fixing, the submission of tenders, the dividing up of markets or discrimination against one or more particular businessmen;

"(3) Businessmen, in the conduct of their sales operations, issue instructions concerning the minimum prices for the resale of commodities." (section 5).

[24] While, in a legal analysis of Swedish antitrust law, the device of giving publicity to the decisions of the Freedom of Commerce Board, to investigations made by the Price and Cartel Office as well as to the decisions and activities of the Freedom of Commerce Commissioner does not call for extensive treatment, this practice points to an important feature of the law and its administration.

The Government has not primarily been concerned with combating large-scale monopolistic combines, as the case often has been in other countries. As evidenced in the preceding historical survey, this was the primary object envisaged in the beginning of the century, but it has more and more been lost sight of subsequently. A marked feature of the antitrust law as it has evolved after World War II, however, is the close connection between governmental measures against restrictive business practices and efforts to maintain general supervision of prices that are charged, particularly for consumer products.

During World War II and for many years thereafter, an effective price control was exercized through the Price Control Board, which had far-reaching powers to decree maximum prices, etc. These war-time regulations were gradually abolished, and eventually the Price Control Board was transformed into the Price and Cartel Office. While stripped of its previous regulatory powers, this Office still has as one of its main aims the task of supervising the price levels and other developments in the economy, particularly respecting consumer goods. (*cf. infra*).

[25] The term used is "entrepreneur" which is common to the Act of 1956 and the

ments in restraint of competition for registration in the Cartel Register (section 8)—may be requested to disclose relevant facts pertaining to restraints of competition and to prices, earnings, costs, profits and other conditions affecting the formation of prices. The relevant sections in the Act are 1, 3, 4, 5, and 6, which read:

> "*Section 1.* It is hereby enacted that anyone engaging in business (entrepreneur) shall be under the obligation to supply information in accordance with the provisions of this Act which may be required to further public knowledge of facts concerning prices and competition in industry and commerce. Other persons than entrepreneurs shall likewise be under the obligation to furnish information in the manner and to the extent prescribed for entrepreneurs where, owing to special circumstances, this is necessary for the verification or completion of information to be submitted by entrepreneurs.
>
> "*Section 3.* An entrepreneur shall be bound to submit upon request to the public authority designated by the King information about such restraints of competition as is specified in the request, which relates to his business activities provided that such restraint of competition concerns prices, production, trade or transportation in Sweden. An entrepreneur shall furthermore supply information respecting prices, earnings, costs, profits and other conditions influencing pricing.
>
> "*Section 4.* The obligation under this Act to supply information shall not imply a duty to disclose trade secrets of a technical nature.
>
> "*Section 5.* Detailed provisions concerning the extent of the obligation to furnish information as well as the manner and time for its accomplishment shall be made by the authority.
>
> "The authority may order an entrepreneur to produce agreements in restraint of competition, books, correspondence and other documents. Any person who is obliged to supply information may also be summoned to appear before the authority.
>
> "The authority shall take care to avoid imposing unnecessary

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Law of 1953. The term is defined in section 2 of the Act and section 26 of the Law, which are identical, as follows:

> "In this Act, the word entrepreneur shall mean any person who professionally:
> —Makes, buys or sells any commodity;
> —Carries on the business of rendering services to others;
> —Writes insurance, or carries on the business of borrowing or lending money, or deals in foreign or domestic currency or in stocks, bonds or other securities;
> —Transfers or licenses copyright or other incorporeal property rights;
> —Licenses the right to use any commodity, or
> —Carries on such hotel or boarding-house business for which an official licence is required.
>
> "The provisions relating to entrepreneurs shall also be applicable to associations of entrepreneurs."

burdens on entrepreneurs in fulfilling their obligation to furnish information.

"*Section 6.* If a request to submit information is not complied with, the authority may order the defaulting person to comply with the request on pain of a fine.

"Orders or summonses issued pursuant to section 5 may also be made on pain of fines."

While, for purposes of investigation of facts, almost no limitations are placed upon the authorities' powers, the right to proceed against business enterprises under the Law of 1953 is limited to restraints of competition which entail harmful effects. The principal section of the Law which defines its scope of application and circumscribes the powers of the antitrust authorities is section 5, which, in effect, contains the only substantive legal rules in the field. This section reads:

"Negotiations pursuant to section 1 above may take place in cases where a restraint of competition—other than such as specified in sections 2 and 3 above—is found to entail harmful effects.

"Harmful effects are those caused by a restraint of competition which influences pricing, hampers the activities of industry and commerce, or obstructs or impedes another enterprise in its business, provided that such effect or effects are incompatible with public policy."

While a close analysis of section 5 can only be made in the context of an examination of the *travaux préparatoires* and rather voluminous case law, its provisions, on their face, are susceptible of a range of interpretation. Thus, one limitation inheres in the term "restraint of competition." Similarly, the words "harmful effects" have been subject to oft-recurring interpretation and consideration in practice, and a multitude of principles and rules have gradually come to attach to this concept. The three situations in which harmful effects shall be deemed to have occurred have all likewise obtained a rather definite meaning; also, the clause "incompatible with public policy" has been the central issue in many cases which have come up for consideration.

The case law and the principles which have emerged in the application of the Law of 1953 are subject to extensive analysis below. It should be remarked, however, that the most important feature of Swedish antitrust law, which has found expression in section 5 of the Law, is the fact that the Law does not prohibit any restrictive practices as such except those referred to above concerning resale-price maintenance and joint co-operation in tendering bids; rather, the Law prescribes that only those restrictions on free competition will be inquired into and processed which are deemed to cause actual harmful effects of a certain character.

2. *Organizational and Procedural Structure.* The three principal Swedish antitrust law institutions are the Freedom of Commerce Board (*näringsfrihetsrådet*), the Office of the Freedom of Commerce Commissioner (*ombudsmannaämbetet för näringsfrihetsfrågor*), and the Price and Cartel Office (*statens pris- och kartellnämnd*). The former two institutions were created in connection with the enactment of the Law of 1953, whereas the third was reorganized at the same time out of a war-time regulatory body, the Price Control Board (*priskontrollnämnden*); it also replaced the Cartel and Monopoly Bureau in the Board of Trade.

The Office of the Freedom of Commerce Commissioner performs, in the process of making Swedish antitrust law effective, supervisory, investigatory and, when necessary, prosecuting functions.[26] It *ex officio* institutes investigations of particular cases as well as of special industries and trades where restrictive business practices exist or are alleged to exist. The Commissioner also acts on complaints made by private parties. Many of the investigations are handled in the Office of the Commissioner, but major inquiries are usually made at the request of the Commissioner by the *Price and Cartel Office.* The latter institution has solely fact-finding functions, and in a wider area,[27] but many of its investigations are made at the instigation of the Commissioner. Generally, reports and studies on particular branches of industry and commerce are published.

Should the Commissioner, as the result of an investigation, find that restrictive business practices have been revealed which can be subsumed under the provisions of the Law of 1953, he attempts to make the parties concerned eliminate or modify the acts restraining competition under review. The vast majority of cases are disposed of in this manner, by free concession on the part of those concerned. Firstly, it often happens that as soon as a party—whether it be a private enterprise, or a group of enterprises, or a business or professional association or organization of some kind—is notified of the fact that the Commissioner is looking into a particular matter, this party withdraws the restraint of competition which is subject to inquiry. Secondly, in a large number of cases where the Commissioner considers that a restrictive business practice infringes the Law of 1953, he so notifies the party involved, whereupon the latter, by his own free will, eliminates or modifies the actions complained of.

It should be noted that, after having ascertained the facts, the Commissioner, much like a public prosecutor, determines whether or not to proceed with the matter. In cases where he arrives at a negative decision, he writes an opinion dismissing the case. While a private

[26] *Cf.* the descriptive report on the activities of the Office of the Commissioner "Näringsfrihetsombudsmannens verksamhet," PKF 1960, 523.

[27] See Kungl. Maj:ts instruktion för statens pris- och kartellnämnd, SFS 1956: 511.

party who has filed a complaint may nevertheless submit a new application directly to the Freedom of Commerce Board pursuant to section 16 of the Law of 1953, in most instances the decisions of the Commissioner are final. These opinions of the Commissioner are published and by now form an important body of precedent.

Should the Commissioner be unsuccessful in his efforts to achieve the elimination or modification of restraints of competition, he must institute proceedings before the Freedom of Commerce Board. While the Commissioner is required to have judicial experience, the Board is not staffed exclusively by jurists; the Chairman and the Vice Chairman must have judicial experience, whereas a third impartial member shall be an expert on commercial and industrial affairs. The remaining six members of the Board, however, represent private enterprise, and consumers and employees, in equal number.

Preliminary proceedings before the Board bear close resemblance to litigation in a court of first instance. The Commissioner then acts much as a public prosecutor, and the opposite party as defendant. The preliminary proceedings result in a decision of the Board which in substance as well as in outward appearance has the characteristics of a judicial opinion. Thus, the evidence is scrutinized and a determination is made whether the restraint of competition can or cannot be subsumed under the provisions of the Law of 1953. Whether the answers are in the negative or in the affirmative, precedents are created; in fact, the numerous opinions which have been issued by the Board form the most important source of law in the antitrust field.

If the decision of the Board is negative, the case is dismissed and will not normally be subject to further inquiry. A decision in the affirmative, on the other hand, is in substance only a decision to the effect that negotiations shall be instituted between the Board and the party concerned. In the course of these negotiations, proposals are made by the Board or by the private party until the procedures adopted or actions taken by the latter have been so modified as to satisfy the Board. Should the Board not succeed in securing a satisfactory agreement, it has authority only to declare the negotiations terminated and shall in such case, provided that the matter is deemed to be of major importance, notify the Government thereof; the Board may also specifically recommend that the Government decree a maximum price for a particular commodity (section 21 of the Law of 1953). It should be noted that this situation has never as yet arisen, principally due to the publicity given to the activities of the Board, and to a desire on the part of business to co-operate to the fullest extent possible.

The notification to the Government has no formal legal significance but is designed to serve as a reminder to private enterprise that the Government may consider enacting new legislation to eliminate re-

strictive business practices deemed to be against the public interest.[28] When appraising the effectiveness of this device, it should be borne in mind that the Swedish legislative process can be swift and that the possibility of quickly passing statutes directed to particular ends constitutes a very practical reality; nor is the Government's freedom of action circumscribed by constitutional guarantees backed by the power of an independent judiciary.[29]

The following legal analysis and survey of the case law will to a large extent include references to the *travaux préparatoires,* i.e., findings and recommendations of the legislative commissions and committees, statements of Cabinet Ministers, and observations of expert parliamentary committees. This approach is in consonance with Swedish legal tradition and Swedish methods of legal analysis, for in Sweden the *travaux préparatoires* often have much greater importance than the decisions of the highest judicial body, the underlying reason being that statutory texts in many fields constitute but compromise, incomplete projections of the large, full-colored weave of thousands of pages of preparatory legislative work.

## III. SURVEY OF THE CASE LAW: EMERGING RULES AND GUIDELINES

At the end of what may be called the formative era of Swedish antitrust law, it is appropriate to state and analyze with some precision its present position, its main practical and theoretical features, and the trends of its development. This requires a review of the *travaux préparatoires* in historical perspective. Even more essential, however,

[28] *Cf.* Andra lagutsk. utl. 32/1953, 36.

[29] Notwithstanding the apparent absence of a need to put the notification procedure prescribed in the Law of 1953 into operation, the Government closely watches developments and reviews the entire field from time to time. Thus, in 1960, a Committee, the Price Supervision Committee (*1960 års prisövervakningskommitté*) was appointed with instructions to review the legislation and law administration relating to price and antitrust matters. Their Report, published in January, 1961 (SOU 1961: 3) stated that "the Committee has arrived at the conclusion that present law leaves room for realization of the aims that the legislation relative to prices and competition has sought to attain" (SOU 1961: 3, 145, *cf.* 43). While, for this reason, no amendments in the Law are proposed, the Committee does not fail to emphasize the experimental character of the system which has been adopted and the fact that the legislation should be revised at a future time (*id.,* 44). The Report instead recommends mainly a considerable increase in the number of investigations to be made by the Price and Cartel Office, and a consequent increase of the staff of that institution (presently numbering 95) and of the Office of the Commissioner (presently numbering 10). In the antitrust field, the Committee specifically proposes that the following tasks should be undertaken:

—continued work on investigations of a vertical character;
—investigation and examination of restraints of competition which are not included in the Cartel Register because of the fact that they are not based on agreements;
—investigation of facts pertaining to competition in decartelized business fields;
—an increased number of inquiries into the effect of restraints of competition in business fields where cartels have considerable importance. (*id.,* 70).

is a close study of the voluminous case law which has been produced by the antitrust authorities, particularly the Board and the Commissioner. Indeed, those who drafted the legislation expressly entrusted the enforcement authorities with an anything but limited mandate to give concrete shape and content in practice to the generalized statutory standards.[31]

In a survey of this character, it seems expedient, at least initially, to link an analysis of the application of the statutory text to the basic elements of which this text is composed.

One may, as a first step, separate from the main body of precedent those cases which relate to illegal business practices (sections 2 and 3; under A below).

The vast majority of cases, naturally enough, have been processed under Section 5 of the Law of 1953. A close word by word analysis alone will make it possible to grasp the full significance of the doctrines evolved under this section. Such analysis is made under B below. That section will be followed by a survey of the attitude of the enforcement authorities to some principal types of restrictive business practices (C). Thereafter, the relation of the antitrust law to legal monopolies based on patents and trade marks, as well as the limited territorial applicability of the Law of 1953 will be separately examined (D). The last section (E) will contain some remarks on the principal characteristics of the enforcement of Swedish antitrust law.

## A. Illegal Practices: Resale-Price Agreements and Joint Co-Operation in Tendering Bids

1. The rule prohibiting vertical price fixing agreements was designed primarily to force liberalization of price competition in the retail trade, and there is no doubt but that the provision has been effective in achieving this aim. A uniform business practice of using "manufacturers' suggested list prices" (*riktpriser*) has been established, and the use of this term in advertisements and in business communications has been deemed *prima facie* to exonerate manufacturers and sellers from criminal liability.[32]

It should be noted that the Law does not prohibit horizontal price fixing. Thus, in a recent case,[33] the Board has held that the use of a

[31] *Cf.*, e.g. SOU 1951: 27, 562–3.

[32] Kungl. Maj: ts prop. 103/1953, 281; *cf.* Note, PKF 1958, 439–40.

[33] Commissioner v. Sveriges Järnhandlareförbund (decision of April 7th, 1961, not yet published). The complaint was based on a demand for elimination of what was alleged to constitute hindrances for the development through competition of an effective retail business in the hardware trade.

It may be mentioned that in another recent case (Note, PKF 1961, 121), respondent members of an association of tiles manufacturers voluntarily ceased to publish a price-listing catalogue after the Commissioner had suggested that the printing and use of this catalogue must be deemed incompatible with public policy under the Law of 1953.

voluminous price listing catalogue in the hardware retail trade, comprising over 40,000 items, cannot *per se* be deemed incompatible with public policy. The main argument adduced by respondent, and accepted by the Board, was that the catalogue served a useful purpose by making price calculations for members of the association simple and more rational. The Board nevertheless ordered institution of proceedings for the purpose of eliminating, *inter alia,* certain provisions embodied in the introductory text of the catalogue which stipulated that members of the hardware trade association would lose the right to use the catalogue if they sold at prices below those stated therein.

Particularly during the first years of operation, the Board often had to pass on petitions for waiver of the prohibition against price fixing agreements. In strict conformity with the text of section 4 of the Law of 1953 (see note 22, *supra*), the attitude of the Board to such applications has consistently been restrictive, and most petitions have been denied.[34] An argument relied upon by a number of manufacturers was that, unless they were allowed to conclude agreements prescribing retail prices, retailers might be expected to charge higher prices than the suggested list prices, which would harm the competitive position of the manufacturers; the Board refuted this allegation by stating that while a seller cannot legally prescribe minimum prices, he is at liberty to fix *maximum* prices.[35]

The Board has granted petitions only in a few cases,[36] and then only for exceptional reasons.

The most important among the waivers granted applies to the book-selling trade and the trade in published music.[37] In 1958, the Board granted permission to the Association of Swedish Book Publishers to conclude resale-price agreements with retailers for a period of five years. The decision was made only after an independent investigation had been made of the book-selling trade by an expert professor of economics. His conclusion, which was deemed by the Board to be in-

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He then attached principal importance to the fact that the members of the association represented 50% of the Swedish tiles industry. A similar case (*id.*) was simultaneously dismissed by the Commissioner, seemingly because the brick manufacturers association concerned represented only about 15–20% of the Swedish brick industry, and because the association stated that no co-operation with respect to price fixing actually took place, despite the existence of the catalogue.

[34] Petition by AB Stilmönster, NFF 1955, 28; Petition by Dux Radio AB et al., NFF 1955, 12; Petition by Kärnan-Uppsala AB, NFF 1955, 26; Petition by AB Svenska Warnerkompaniet, NFF 1955, 1; and Petition by Sexualhygien AB, NFF 1955, 8.

[35] See e.g., Petition by Dux Radio AB et al., NFF 1955, 12 and Petition by Sexualhygien AB, NFF 1955, 8.

[36] Petition by Statens Jordbruksnämnd re trade in Baltic herring, NFF 1955, 21; Petition by Svenska Tidningsutgivareföreningen, PKF 1959, 359–362; 1960, 410–12.

[37] Petition by Svenska Bokförläggareföreningen, NFF 1955, 68, *cf. id.* 25–26; Petition by Svenska Musikförläggareföreningen, NFF 1955, 77; Note, PKF 1957, 487; Petition by Svenska Bokförläggareföreningen, PKF 1958, 442–56, *cf. id.* 608–12; Petition by Svenska Musikförläggareföreningen, PKF 1958, 456–60.

herently probable, was that an abolition of retail-price maintenance in the book-selling business would have a profound effect upon the whole structure of the trade. It was stated that the present sales system, which permits retailers to return unsold books to the publishers, together with strict price maintenance, made it possible for most retailers, to render extensive service to customers and to keep large stocks of books. The price competition on the retail level which would likely follow from a denial of the petition would most likely have the effect of eliminating much of the individual customer service and of making it impossible or uneconomical for retailers to maintain a large and varied stock of books. Since those books which are most valuable from a cultural point of view are also in the main the most difficult ones to sell, the long-range effect of an abolition of retail-price maintenance agreements would probably be reluctance by booksellers to sell other than the most profitable products, or those which can be sold in large volume. This would in turn have the consequence that, due to a decrease in sales, a lesser number of culturally valuable books would be published. For these reasons, the Board granted the petition, but only on condition that certain other restraints of competition in the trade be abolished.[38] A similar decision was made in respect of the sale of published music.[39]

2. Joint filing of bids is illegal only if it is the result of contractual undertakings, i.e. if it amounts to organized co-operation among several enterprises pursuant to a cartel-like agreement. Thus, the prohibition extends only to the making or implementing of agreements to such effect and does not comprise consultation among several enterprises in making one specific bid, nor joint submission by several enterprises of one specific bid.[40] Petitions for waiver of the prohibition have been granted in some instances where joint bidding has been deemed to be expected to result in lower costs, accruing substantially to the benefit of consumers[41] or otherwise to be expedient from a public point of view.[42]

The interesting question has recently been brought up whether the tendering of bids by a sales company or sales organization set up jointly by several enterprises would be incompatible with section 3 of the Law of 1953.[43] The case concerned an economic association formed by the majority of Swedish manufacturers of wool fabrics which, *i.a.*, was to have exclusive rights to tender bids for a variety of important products, as well as to sell such products and allocate orders and sales

[38] Petition by Svenska Bokförläggareföreningen, PKF 1958, 442, at 451–2.

[39] Petition by Svenska Musikförläggareföreningen, PKF 1958, 456, at 459–60.

[40] Kungl. Maj: ts prop. 103/1953, 139; *cf.* Petition by Stockholms Charkuteriidkareförening, NFF 1955, 87, at 89.

[41] Petition by N.E. Wiklund et al., NFF 1955, 41; In re Petition by Three Butchers' Associations, PKF 1957, 120–21.

[42] Petition by Svenska Flygförsäkringspoolen, NFF 1956, 25–26.

[43] Petition by Svenska Yllefabrikanters Försäljningsförening, PKF 1960, 614.

among the members. The Board, stressing that the economic association constituted a separate legal entity, held that, while an independent legal person entrusted with the tendering of bids on behalf of members or owners could *per se* be subsumed under the word "entrepreneur" basic to the Law, it would not be proper to apply section 3 to the organized co-operation which was intended to take place between the association and its members. The Board attached considerable weight to the rationale that the prohibition should extend only to situations where *concealed* co-operation takes place, and where separate bids are made which have the false appearance of being independent but have in reality been the object of prior consultation among the bidders pursuant to a cartel agreement. In the case under review, however, it was evident to outside trading partners that bids submitted by the association were the result of co-operation among the members. Apart from reminding petitioner that the cartel agreement and the activities of the economic association might be processed under the negotiation provisions of the Law of 1953, should it be found to entail harmful effects, the Board furthermore restricted the scope of the decision by inserting the following caveat:

> "Even if an interpretation of the scope of [section 3] leads to the result that the formation of an independent legal entity for tendering bids does not as such constitute an infringement thereof, it may be argued that the prohibition must nevertheless be deemed applicable to a sales organization which is a mock arrangement, or a purely formal set-up."[44]

The decision of the Board in the *Wool Fabrics Manufacturers* case thus drew a fairly clear line of demarcation, indicating the proper limits of permissible business practices with regard to a significant legal issue. The importance of the case is diminished, however, by the fact that the courts of law have exclusive jurisdiction in criminal proceedings under sections 3 and 4 of the Law. The matter was brought to the Board on petition for waiver, provided that the arrangement *per se* could be deemed incompatible with section 3 of the Law, which, petitioner argued, was not the case. A court of law—acting upon a complaint filed by a public prosecutor with permission of the Commissioner—might well analyze the issue differently and arrive at a different result. However, what the decision does offer of value as a guideline for the future is that the Commissioner might accept it as a norm for recommending the institution of criminal proceedings, and for giving or withholding his approval to such.[45]

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[44] *Id.*, at 620–21.

[45] The statements in the foregoing paragraph apply, *mutatis mutandis,* to all cases cited under section A above.

## B. Analysis of Section 5

1. *"Restraint of Competition."* The basic concept of the Law is "restraint of competition."[46]

Presumably only specific "acts" undertaken by an enterprise may be processed, and no action will lie for the reason only that restraints of competition are the result of legislation, governmental regulations, or a natural scarcity of goods; should, however, a situation of the latter kind be unduly exploited by an enterprise, section 5 will be applicable.[47]

It has been deemed impossible or meaningless to define the concept "restraint of competition" used in the statutory text.[48] The legislature has, naturally enough, not considered the term analogous only to restraints of "perfect" or "pure" competition as these words are commonly used in economic literature[49] nor indeed desired to outlaw monopolies or oligopolies,[50] nor, conversely, limited the scope of the Law, in this manner, to any particular types of restraints.[51] But while the 1953 version of the Law included principally cartels and monopolies,[52] the 1956 amendments purposely made it applicable to *any* restraints,[53] and the most explicit explanation of the concept to be found in the *travaux préparatoires* is only that the term "comprises, theoretically, any circumstance which in one way or another restrains free competition."[54]

What has been stated above seems to render futile any effort to list and classify those types of restraints of competition which have so far been processed; they are better explained and analyzed in a different context.

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[46] The Myrdal Commission proposed that a different concept be used in the Law, *viz.* the term, common in economic literature, "imperfect competition" (*ofullständig konkurrens*). At the suggestion of the Legislative Committee of the Supreme Court, however, the term "restraint of competition" was substituted therefor. (Kungl. Maj: ts prop. 264/1946, 56, *cf.* 59).

[47] Näringsfrihetsrådets utl. t. Chefen för Handelsdep. över SOU 1955; 45, NFF 1956, 16; Kungl. Maj: ts prop. 148/1956, 39–40. The 1960 Price Supervision Committee stated, *per contra,* that not only "acts" but also "situations of different kinds" come within the purview of the Law of 1953; the Committee did not, however, elaborate upon this statement. (SOU 1961: 3, 82).

[48] The Commission on Establishment stated that "A suitable definition which fully covers this concept can hardly be made because of its very nature, and, if made, would be so vaguely formulated that it would give little guidance for determining when a restraint of competition shall be deemed to exist." (SOU 1951: 27, 517).

[49] "The purpose [of Swedish antitrust law] is not to achieve what the classical theory of economics describes as 'perfect competition' but the kind of competition which is most effective in our society, i.e., a competition which influences developments in a direction which from a long-range point of view may be considered to result in the best possible utilization of the resources of our society" (Kungl. Maj: ts prop. 148/1956, 41).

[50] *Cf.* on this aspect under section C, *infra.*

[51] *Cf.* SOU 1951: 27, 520–25.

[52] *Cf.* note 19, *supra.*

[53] *Cf.* text at note 19, *supra;* SOU 1955: 45, 122–25; Näringsfrihetsrådets utl. t. Chefen för Handelsdep. över SOU 1955; 45, NFF 1956, 16.

[54] Andra lagutsk. utl. 35/1956, 18.

One point deserves interest, however. The Law speaks of *restraints* of competition—not of unreasonable *methods of competition,* such as price cutting, buying out of competitors, selective destruction, local price discrimination, etc. Such practices do not seem to have been contemplated by Swedish legislative authorities, presumably because no flagrant cases of a malicious or offensive character knowingly have occurred. It is difficult to say whether, e.g., selling at or below cost for the purpose of eliminating competitors violates Swedish antitrust law.[55] To some extent, this is the province of the Law of Unfair Competition.[56] This statute suffers from basic imperfections, but it is at present being reviewed by a Government committee with a view to enacting a new law on the topic,[57] and this fact tends to support rather than contravene the argument that methods of competition are not matters which can normally be processed under the antitrust statutes. One may therefore be justified in concluding that under present law, a good case can be made for admitting even drastic competitive measures on the mere ground that they constitute means of exercising free competition rather than restraints of competition. It is to be assumed, however, that enterprises enjoying a monopolistic position are well advised to proceed with caution.

2. *"Harmful effects."* The requirement that action may be taken against restraints of competition only if such restraints actually cause harmful effects, is vital in Swedish antitrust law. It means that no arrangements are *per se* incompatible with the Law unless it be shown that harmful effects ensue; nor is the purpose of an act decisive for the determination of its legality.[58] The concept "harmful effects" is defined in the statutory text. Restraints may be processed only if they (a) result in one or more of the following three types of effects, viz. influence pricing, hamper the activities of industry and commerce, or obstruct or impede another enterprise in its business, and (b) such effects are deemed to be incompatible with public policy. It rests upon the Commissioner to prove that effects of either of these three types do in fact make themselves felt in each particular case,[59] and that the effects are incompatible with public policy.

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[55] Jägerskiöld considers that it does not, 21 Förvaltningsrättslig tidskrift 101, at 123 (1958).

[56] Lag den 29 maj 1931 med vissa bestämmelser mot illojal konkurrens; *cf.* also Law on Contracts (*avtalslagen*), section 38.

[57] While the present law of unfair competition is limited to a few specified practices, the Committee (*utredningen om illojal konkurrens*) reportedly may propose the enactment of a clause prohibiting unfair competition in general.

[58] Kungl. Maj: ts prop. 103/1953, 101.

[59] In the bill with which the Law of 1953 was submitted to Parliament, the responsible Minister made the ambiguous statement that although it is not enough that there is a risk that such effects will occur, it does not always seem necessary that concrete harmful effects actually have resulted, particularly in regard to hindrances for industrial and commercial activities by e.g., severe cartelization. (Kungl. Maj: ts prop. 103/1953, 118). *Cf.* Inquiry by Sveriges Elektriska Entreprenörsförening, NFF 1955, 7.

(*a*) *The three types of "harmful effects."* The case law has been developed in close connection with the three types of effects which, if incompatible with public policy, are deemed to be harmful in section 5 of the Law. The Board has often had occasion to remark that they must be viewed as distinct from one another and therefore as separate legal grounds;[60] it may be remarked in this context that the Board has established a practice of carefully examining in each important case whether any of the three types of effects can be said to have been caused.[61]

Among the three types, that of impediments to the business of other enterprises has been most frequently invoked; the cases which have centered principally on this issue are too numerous to cite.

Statements to the effect that restraints of competition hamper commercial and industrial activities have mostly been made as subsidiary arguments, particularly where newly established kinds of retail businesses have experienced difficulties in purchasing supplies. The cases in which this type of effect has been deemed decisive are few and have mostly concerned market division cartel agreements, etc.[62]; this would seem to be in consonance with the purpose of the provision, which was primarily intended to prevent preservation through cartel arrangements of uneconomical business units, and voluntary restrictions on dynamic technical and organizational business management.[63]

Similarly, instances where the effects on pricing of restraints of competition have been accorded dominant importance are rare.[64]

(*b*) *"Incompatible with public policy."* The rule that the Law applies to harmful effects such as defined only if the effects are incompatible with public policy was added to section 5 by the Minister responsible for drafting the bill with which the Law was submitted to Parliament in 1953. His reasons for doing so were expressed as follows:

> "The general policy which the proposed legislation is meant to realize is mainly to prevent clear abuses and patently unsatisfactory conditions. Furthermore, it is evident that other public policy considerations than the desire to maintain a maximum measure of free competition may sometimes not only warrant restraints of competition but also excuse [harmful] effects of the three different types which are defined [in the statutory text]. It seems to me that this fact should be brought to expression in the definition itself. Therefore, the further limitation should be established that the Law shall apply only in the measure that restraints of competition cause harmful effects which are incompatible with public policy."[65]

[60] E.g., Commissioner v. Svenska Tidningsutgivareföreningen, NFF 1956, 7, at 15.
[61] *Cf.* Commissioner v. Svenska Tidningsutgivareföreningen, NFF 1956, 7.
[62] *Cf.* Commissioner v. Gällivare Bryggeri Kommanditbolag, PKF 1957, 115–118.
[63] Kungl. Maj:ts prop. 103/1953, 118.
[64] *Cf.* Commissioner v. Svenska Tidningsutgivareföreningen, NFF 1956, 7; *In re* TCO et al. v. MC, Linköping, NFF 1956, 11.
[65] Kungl. Maj:ts prop. 103/1953, 116.

In 1956, when the scope of the Law was extended, the responsible Minister stated that the concept "evidently [restricts the applicability of the Law to cases where] the effects are harmful indeed from a public point of view."[66] Thus, harmful effects, as this term is understood in the Law, will not be demed to have been caused unless such effects have major significance.

In applying this discretionary rule, the Board early laid down and has since followed as a principle of interpretation the method of explicitly considering and discussing the advantages resulting from an act or an arrangement as contrasted with ensuing disadvantages; if the advantages in any particular case are deemed to be considerably greater than the disadvantages, the case is dismissed, and *vice versa.* This principle was perhaps most clearly expressed in *Commissioner v. Svenska Tidningsutgivareföreningen,*[67] where the Board stated, *inter alia:*

> "The newspapers and the authorized advertising agencies have emphatically denied that the arrangements implemented by them are incompatible with public policy.[68] For this reason, the Board must stress that it has never been suggested by anybody that the arrangements are in any way morally reprehensible. The requirement of the Law that harmful effects . . . must be incompatible with public policy signifies only that the advantages accruing therefrom shall, considered from a public point of view, considerably outweigh resulting disadvantages."[69]

Evidently, the exact meaning and purport of the general standard "incompatible with public policy," by reference to which most cases have been decided, cannot be ascertained save through intensive case analyses. It seems more logical, however, to tie such analysis to the various main types of situations which the enforcement authorities have had to consider, and it will therefore be deferred to a following section (C). It may lastly be mentioned only that, in applying the general standard, the Board has repeatedly professed its settled belief in the principal value and beneficial effects of free competition. It may suffice to quote as an illustration an early case where an association of bicycle dealers was tried for having persuaded manufacturers to ab-

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[66] Kungl. Maj:ts prop. 148/1956, 40.

[67] NFF 1956, 7.

[68] It must be observed that the Swedish text, which in this study has been rendered with the expression "incompatible with public policy," literally reads "[restraints which] *in an improper manner* cause [effects, etc.]."

[69] NFF 1956, 7, at 20. Other cases where this method of analysis has been used in a markedly avowed manner are: Commissioner v. Sveriges Färgfabrikanters Förening, NFF 1956, 8; Commissioner v. Gällivare Bryggeri Kommanditbolag et al., PKF 1957, 115; Commissioner v. AB Åtvidabergs Industrier and AB Addo, PKF 1958, 129.

stain from effecting deliveries to a dealer who sold products in large volume at considerable discount. The Board stated, *inter alia:*

> "The Association has contended that Engelbrekt's price policy has made it more difficult for the competitors to retail their products and therefore to obtain a living, and we do not doubt the truth of this statement. It is quite natural, under these circumstances, that the other members of the Association have been inclined to eliminate Engelbrekt's competition. The dispositions of the Association do therefore seem to constitute attempts to protect its members' chances to obtain a living. On the other hand, effective competition is of utmost importance in our society, not merely on account of its favorable effects on the price levels—from which the consumers benefit—but also on the efficiency of the particular business concerned. The Association has itself stated that the number of retailers within the area is too large. A development that hampers free competition and that makes prices less elastic tends to prevent a rational structure of the business. When weighing these conflicting considerations, we find that the interest of society of free competition is of greater importance than the need of the members of the Association to obtain protection for their economic interests. For this reason, the hindrance in Engelbrekt's commercial activities that has been caused by the dispositions of the Association must be deemed incompatible with public policy."[70]

### C. Objects of Enforcement Activities

While Swedish antitrust law embraces, in principle, all restraints of competition, regardless of their nature, in practice enforcement has been limited to only a few distinctive types of restrictive business practices. These types are discussed below.

*1. Monopolies, Oligopolies, and Dominant Economic Power.* As previously remarked, Swedish antitrust law has not in recent times been primarily directed to the end of combating monopolies, oligopolies, or the concentration of dominant economic or financial power, which might have repercussions on free competition. Government authorities have recognized the fact that in a market as small as the Swedish, many branches of industry must necessarily have the structure of a monopoly or an oligopoly;[71] the competition offered by foreign firms has been considered in the main to offset the disadvantages resulting from these structural deficiencies.

The antitrust authorities have been expressly barred from instituting proceedings with a view to breaking up large enterprises into smaller

[70] Commissioner v. Örebro Läns Cykel- och Sporthandlarförening, NFF 1955, 96, at 104.

[71] SOU 1951: 27, 13, *cf.* 523.

units.[72] The legislation has indeed never contemplated measures aimed at reorganizing the structure of Swedish industry such as it has been, and continuously is being built up by mergers, vertical and horizontal integration, etc.; even political discussion of these topics *de lege ferenda* has not envisaged the problems in the context of antitrust law.

Similarly, it may be mentioned that although it is a matter of public knowledge that some industrial and financial interests are closely joined together into power blocs of major importance, it has never been suggested that antitrust action should be taken against such combines, even if monopolistic in character. Although a private motion moved in Parliament in 1960 requesting that a Government investigation be made of the "concentration of power in private enterprise" was accepted by a majority, it has not resulted in a demand by Parliament to the Government and probably never will.[73]

This said, it must be emphasized that any unilateral action undertaken by an enterprise which enjoys a monopolistic position in any sector of the economy, nationally or locally, may theoretically be subject to careful investigation by the antitrust authorities if it entails harmful effects. The Board, indeed, has made it clear that the very circumstance that an enterprise has a dominant position on the market must deserve particular attention in cases when they are involved, presumably meaning that such enterprises must scrupulously avoid even the appearance of abusing their power.[74] The Commissioner seems to have adhered to a similar principle in cases which have been dismissed by him, or which have been settled before being brought to the Board.[75]

This approach toward monopolies was graphically expressed by the Commissioner in the opinion with which he dismissed the complaint in the case *in re TCO et al. v. MC, Linköping,*[76] The issue there was whether a milk processing plant belonging to a group which holds a monopoly for milk products in large parts of Sweden was justified in replacing a bottling machine with a paperbox packing unit, which necessitated an increase of the price of milk and cream. The Commissioner in this case made a detailed investigation and evaluation of the reasons that had prompted this decision on the part of the enterprise. Eventually, the change in packaging methods was found to constitute "a sound business action," but only after the entire range of facts in-

[72] Näringsfrihetsrådets utl. över SOU 1955: 45, NFF 1956, 148 ff.; Kungl. Maj:ts prop. 148/1956, 41.

[73] Motion AK No. 536, Parliamentary Debates 29th April, 1960, Riksdagens protokoll AK 15/1960, 36; FK 15/1960, 53; Handelsdep. File No. 259, 1960.

[74] Commissioner v. Åtvidabergs Industrier and AB Addo, PKF 1958, 129, at 134; *cf.* Commissioner v. Svenska Sockerfabriks AB, NFF 1956, 21.

[75] *In re* Bröderna Åström AB v. Fox Film AB, NFF 1955, 31; *In re* ASK-bolagens ekonomiska förening u.p.a. and Löfgren & Jönsson v. Söderquist & Albihn AB, NFF 1955, 9; Commissioner v. Porterbryggeri AB D. Carnegie & Co., PKF 1957, 121.

[76] NFF 1956, 11.

fluencing the decision had been weighed against resulting disadvantages for the consumers.

If the methods of inquiry and analysis adopted by the Commissioner in the *MC* case obtain recognition and approval in the future by the Board, this institution will indeed have the wherewithal to extensively scrutinize and review, upon complaints brought by private parties, almost any business policy and business decision adopted by an enterprise which enjoys national or local dominance in the market. It is, however, too early to say whether the Board will venture to assume such wide responsibility and how the concept "monopoly" will then be defined.

2. *Cartels.* Proceedings against cartels have been instituted on rather few occasions. One case, involving a cartel agreement in the brewery business,[77] gave the Board opportunity to display its attitude to a full-fledged market division arrangement which allocated districts between the participants, who, taken together, held a monopoly in the area affected by the agreement. The Board, which initially praised the recent tendency in the brewery industry to do away with cartel arrangements of this kind, was confronted with a situation where the parties, while desirous of terminating their agreement, could not agree on the terms and conditions for termination. Having regard to the high distribution costs in the sparsely populated northern areas of Sweden to which the cartel agreement applied, the Board held that the agreement served a useful purpose by lowering these costs. Hence, the effect of the cartel agreement could not be deemed *per se* incompatible with public policy, and since the Commissioner had not proved that any specific harmful effects resulted, his complaint was dismissed.

Some other cases concerning market division arrangements have been examined as a result of complaints brought by businesses which have experienced difficulties in purchasing supplies, but these cases have been of minor interest and importance.[78] Similarly, cartel agreements with price-fixing provisions,[79] or establishing import quotas,[80] have been considered by the Commissioner. In a recent case concerning the coal and coke trade, the Commissioner pronounced that cartels in this industry are not in his opinion sufficiently important to merit thorough examination at a time when inquiries into other matters seem to be more pressing from a public point of view.[81]

[77] Commissioner v. Gällivare Bryggeri Kommanditbolag et al., PKF 1957, 115.

[78] Commissioner v. Nordvästra Skånes Mejeriförbund, PKF 1957, 251; Note, PKF 1959, 57.

[79] *In re* Skyddsföreningen för utländska värdepapper v. Stockholms Enskilda Bank et al., PKF 1957, 112. See also the important recent case in re Bofors AB et al., PKF 1961, 125, in which a cartel agreement was voluntarily cancelled. *Cf.* Commissioner v. Sveriges Järnhandlareförbund, described at note 33 *supra.*

[80] Commissioner v. Sveriges Blomsterlöksdrivares förening, NFF 1956, 10.

[81] *In re* Cartel Agreements in the Trade with Coal and Coke, PKF 1960, 363.

In fact, the only cartel agreement provisions which have been subject to frequent enforcement action have been restrictions on new business of professional establishment; the Board and the Commissioner have uniformly endeavoured to persuade parties to cartel agreements of such character to liberalize stipulated restrictions.[82]

*3. Discrimination.* At the time of the enactment of the Law of 1953, it was suggested that a general clause prohibiting discrimination should be added to its text, but this idea was rejected by the Minister[83] even though the matter of discriminatory practices in respect particularly of price and sales policies was extensively considered in the previous legislative process and in the Government's bill to Parliament.

Discrimination of this kind constitutes a restraint on competition to which the Law of 1953 applies; the harmful effects which the discrimination might cause tend to manifest themselves primarily in hindrances to the business of other enterprises. Hence, there is wide room for complaints brought by private parties, and in fact such complaints have been so numerous that seemingly the Commissioner's time has largely been occupied by actions on discriminatory practices. While many complaints have been dismissed, or have resulted in voluntary elimination of restraints, a number of cases have been brought before the Board, and in the process, legal rules on discrimination have gradually crystallized. This area is therefore one of the few in which fairly clear standards have been established.

By far the largest group of discrimination cases have concerned what has become known as *selective selling,* i.e. decisions on the part of enterprises not to sell their products to certain wholesalers or retailers who have desired to market those products.

Sales discrimination of this kind often is the result of a marketing policy designed to limit the number of outlets with a view to achieving a larger sales volume, to effecting savings in distribution administration costs, or to securing high quality service to consumers on the retail level. To the extent that "rational business considerations" of like or similar nature make sales discrimination seem reasonable and desirable,

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[82] Commissioner v. Kemisk-Tekniska & Livsmedelsfabrikanters förening et al., NFF 1955, 81; Commissioner v. Norrköpings Cykel- och Sporthandlareförening, NFF 1956, 1; Commissioner v. Svenska Tidningsutgivareföreningen och AB Svenska Pressbyrån, NFF 1956, 1; Commissioner v. Svenska Tidningsutgivareföreningen, NFF 1956, 7; *In re* Söderbergs Foto- och Pappershandel v. Svenska Pressbyrån, PKF 1957, 108; *In re* Ornäs v. Svenska Tidningsutgivareföreningen, PKF 1957, 109; Commissioner v. Sveriges Tandläkarförbund, PKF 1958, 138 and 1960, 53; *In re* Sveriges Fotoleverantörers förbund (SFL), PKF 1958, 601; Norell v. AB Tipstjänst, PKF 1959, 413; *In re* Bilverkstädernas Riksförbund, PKF 1960, 124; *In re* Sveriges Elgrossisters Förening and EJO, PKF 1960, 359; *Cf.* Näringsfrihetsrådets utl. till Chefen för Handelsdep. över en hemställan till Kungl. Maj:t från Sveriges Låssmedsmästares Riksförbund om utredning angående former för auktorisation av låssmeder, PKF 1959, 566.

[83] Kungl. Maj:ts prop. 103/1953, 180 f.

the legislative authorities have repeatedly recognized that discriminatory selection by an enterprise of its customers constitutes a proper business practice which cannot be processed under the Law of 1953[84]; it has been emphasized, however, that a stricter attitude should be taken vis-à-vis monopolistic enterprises.

In a number of cases, the Board and the Commissioner have deemed discriminatory sales policies legitimate under the antitrust law. While, in general, the formal ground on which complaints have been dismissed has been the incompatibility with public policy clause, the facts considered decisive have varied. Often—and notably in respect of, *i.a.*, exclusive or specialized products such as cosmetics, complicated technical products requiring skilled servicing, or in situations where purchasers might be expected not to handle retail sales of the product properly—the selective selling has been considered to be based on "rational business considerations" and has therefore been held immune from antitrust proceedings.[85] At other times, the argument adduced by respondents to the effect that selective selling was necessary in order to prevent an actual increase of distribution administration costs, or otherwise to maintain a rational and effective business administration, has been accepted.[86] Another group of cases have affirmed as a general principle the rule that poor credit standing[87] or other personal disqualifications—such as lack of business experience—on the part of prospective purchasers[88] constitute legitimate excuses for other enterprises to refuse to entertain business relations with them. Lastly, it may be mentioned that the requirement of "harmful effects" has been deemed to bar action in cases where similar products might be obtained by a buyer on comparable conditions from other sources than respondent's enterprise,[89]

[84] Kungl. Maj:ts prop. 103/1953, 182; SOU 1955: 45, 126 f.; *Cf.* Näringsfrihetsrådets utl. över SOU 1955: 45, NFF 1956, 17 f.

It was stated by the Minister that "generally speaking, a seller has the right, in principle, to personally determine his proper sales methods and thereby also, to a certain degree, has the right to freely select his customers according to his own opinion of what he finds best from his particular point of view." (Kungl. Maj : ts prop. 148/1956, 117.)

[85] *In re* AB Robert E. Dahlström v. AB Svenska Frisördepoten, PKF 1957, 113; Commissioner v. AB Åtvidabergs Industrier and AB Addo, PKF 1959, 129; *In re* X v. Como AB, PKF 1958, 639; Note, PKF 1959, at 606; *In re* X v. Elisabeth Arden, PKF 1959, 457; *In re* X v. Svenska Siemens AB, NFF 1956, 2; *cf. In re* Tillbehörscentralen, Gävle v. Gaeverts Svenska AB and Bolle AB, NFF 1955, 8.

[86] *In re* X v. Svenska Siemens AB, NFF 1956, 2; *In re* X v. Wasa Spisbrödsfabrik, PKF 1957, 547; Commissioner v. Svenska Tidningsutgivareföreningen and AB Svenska Pressbyrån, NFF 1956, 1; *In re* Hede Bok- och Pappershandel v. Svenska Tidningsutgivareföreningen, NFF 1956, 4; *In re* Söderbergs Foto- och Pappershandel v. Svenska Pressbyrån, PKF 1957, 108; *In re* Ornäs v. Svenska Tidningsutgivareföreningen, PKF 1957, 109; Note, PKF 1961, 123 (No. 20).

[87] *Cf.* Notes, PKF 1958, 437.

[88] Notes, PKF 1958, 437; Note, PKF 1959, 643; Note, PKF 1959, 460.

[89] Note, PKF 1958, 257; Note, PKF 1959, 293; Note, PKF 1959, 162; Note, PKF 1960, 553, *cf.* the two cases noted *id.* at 554-6; *In re* X v. AB Eol, PKF 1961, 122; Note, PKF 1961, 123 (No. 20).

or where the refused delivery has been deemed not to cause the complaining party substantial harm for other reasons.[90]

In a number of rather disparate cases from which clear legal conclusions cannot be drawn, respondents have voluntarily agreed to make deliveries as requested after complaints have been filed with the Commissioner, or after the Commissioner has initiated an inquiry *ex officio*[91]; the frequency of these instances goes to show primarily the important effects of the very existence of the Board and of the Office of the Commissioner.

Somewhat clearer legal rules on sales discrimination emerge from those cases in which refusals to deliver goods have been censured by the Board. Thus, the rule has been firmly established that no enterprise may refuse to sell its products to prospective buyers by reason of pressure exercised by other customers aimed at eliminating in this manner unwelcome competition.[92] It is apparently safe to conclude that such undue pressure having been shown, it will rest upon respondent to prove the existence of justifiable reasons for his refusal to sell products to the complaining party.

A closely related and often intertwined group of cases have principally originated in unwillingness on the part of wholesalers in the grocery business to supply goods to newly established retail enterprises which by selling only in large volume and on the basis of a 'warehouse-to-home-delivery plan' have managed to effect substantial price reductions. The traditional wholesale trade has often considered this new form of competition unfair and has—doubtless often induced to do so by competing retailers—attempted to hinder its development by refusing to furnish supplies. Efforts in such direction have, however, consistently been looked upon with disfavor by the antitrust authorities.[93] The

[90] Note, PKF 1959, 294; *In re* X v. AB Orrefors Glasbruk, PKF 1960, 362; Hedman v. AB Isaksson & Co., PKF 1960, 413; *In re* ASK-bolagens ekonomiska förening u.p.a. and Löfgren & Jönsson v. Söderquist & Albihn AB, NFF 1955, 9; *In re* Berglund v. Svenska Musikhandlareföreningen, NFF 1956, 1; Note PKF 1959, 62; *In re* Samköp *et al.* v. X, PKF 1960, 122.

[91] *Cf.*, e.g., *In re* Bröderna Åström AB v. Fox Film AB, NFF 1955, 31; Note, PKF 1957, 546; Commissioner v. Nordvästra Skånes Mejeriförbund, PKF 1957, 251; Commissioner v. AB Bröderna Sandblom et al., PKF 1958, 261; Note, PKF 1958, 258; Commissioner v. Hasselblads Fotografiska AB et al., PKF 1959, 295; Commissioner v. Kaffe AB Pyramiden, PKF 1959, 569; Note, PKF 1957, 545; Commissioner v. Handels- och Import AB Bröderne Larsson, PKF 1957, 253; Commissioner v. Porterbryggeri AB D. Carnegie & Co., PKF 1957, 121; *In re* Bollnäs Sparköp, PKF 1961, 124; Note, PKF 1961, 123 (No. 19).

[92] Commissioner v. Örebro Läns Cykel- och Sporthandlarförening, NFF 1955, 96; *In re* P. O. Ahl v. Sveriges Beklädnads- och Manufakturhandlarförbund, NFF 1956, 4; Commissioner v. AB Durotapet, PKF 1957, 549, *cf.* PKF 1958, 607; Note, PKF 1958, 325, at 326; *In re* X v. SFL, PKF 1958, 637; Note, PKF 1958, 602; Note, PKF 1959, 560; *In re* Sveriges Textilhandlareförbund, PKF 1959, 557; *In re* Hemservice v. Kockums Jernverks AB, PKF 1959, 463; *Note,* PKF 1959, 66.

[93] Commissioner v. Sveriges Möbelindustriförbund, NFF 1955, 54; Commissioner v. Handels- och Import AB Bröderne Larsson, PKF 1957, 253; Note, PKF 1957, 145;

leading case is *Commissioner v. AB Hakon Swensson et al.*,[94] where the Board, in its opinion which ordered institution of negotiations, stated that it was a fact that, due to delivery refusals by some local wholesalers, a retail business of the type described above experienced substantial cost increases for transportation of most of its supplies from distant places. Furthermore, it was deemed clear that the sales discrimination was based on unwillingness in principle on the part of respondents to entertain business relations with a retail business of this type. Relying on statements in the *travaux préparatoires* to the effect that such action would infringe the antitrust law, the Board further held that

> "In the opinion of the Board, discrimination of this character is particularly questionable if it is aimed at hindering new types of enterprises which seek to apply new methods or which otherwise evidently desire to engage in active competition, including price competition. Were such discrimination to succeed, it would in a regrettable manner help to conserve existing organizations and methods in industry and commerce and would make structural rationalization more difficult. This would be harmful to the national economy. One cannot at the present time safely predict whether the methods of distribution used by the complaining party will have the strength to survive in the future. But in the very spirit of competition inheres the freedom to try these methods of competition in order to test their strength."[95]

It was stated above that a general prohibition against discrimination was expressly rejected by the legislature. The different groups of cases which have been referred to in the foregoing have been confined to the particular principles expounded in the text above. It is sometimes contended that in a few other isolated cases, the antitrust authorities seem to have taken a first step toward establishing the principle of nonadmissibility of business discrimination generally,[96] but this tentative development does not as yet admit of clear demarcation, and it would probably be erroneous to assume that a general principle to such effect is being consciously shaped in practice. Nor have so far the few cases of discriminatory pricing—as distinct from sales discrimination—established other than tentative guidelines for the future.[97]

Commissioner v. Hasselblads Fotografiska AB et al., PKF 1959, 295; Commissioner v. Kaffe AB Pyramiden, PKF 1959, 569; Note, PKF 1960, 560. *Cf.* the two distinct cases relating to co-operative stores organized privately by a group of consumers (such as an officers' club): Commissioner v. AB Eol et al., PKF 1959, 258 and Commissioner v. AB Coffea, PKF 1960, 279.

[94] PKF 1959, 68; *Cf. id.*, at 296 (negotiation proceedings).

[95] *Id.*, at 81.

[96] Note, PKF 1958, 326; *In re* X v. Skånemässan, PKF 1959, 461, where, however, the monopolistic position of respondent might have been the decisive factor.

[97] Commissioner v. Svenska Sockerfabriksaktiebolaget, NFF 1956, 21; *In re* Svenska

## D. Scope of the Antitrust Law

*1. Patents.* The applicability of Swedish antitrust law to the legal monopoly conferred by patents received incidental attention in the bill with which the Law of 1953 was submitted to Parliament. The Minister stated that

> "A patent often has the effect of boosting the price for the [patented product], but as such effects are caused by the very nature of the patent, they cannot be deemed incompatible with public policy. The position may be different if the patent right is exercised, e.g., with the aim to force or support another restraint of competition."[98]

The Commissioner made some remarks on the problem in answer to an informal inquiry in which, relying upon various statements in the *travaux préparatoires,* he tentatively distinguished between "direct" and "indirect" effects of the exercise of patent rights; in his view, antitrust action may be taken only if "indirect" harmful effects are caused.[99] The rather vague statements now referred to are the only authoritative pronouncements made in Swedish law so far on this significant issue.

*2. Trade-marks.* In an early case,[100] the Commissioner dismissed a complaint by a soft drink manufacturer in which it was argued that the licensor of a trade-marked label violated the antitrust law by maintaining an exclusive licensing arrangement in southern Sweden. The

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Mejeriernas Riksförening, PKF 1957, 471; Commissioner v. Porterbryggeri AB D. Carnegie & Co., PKF 1957, 121; *In re* Domus v. Grammofonleverantörernas förening, PKF 1960, 559; *In re* X v. Svenska Sockerfabriksaktiebolaget, PKF 1960, 557; *In re* Bilverkstädernas Ricksförbund, PKF 1961, 121.

[98] Kungl. Maj:ts prop. 103/1953, 119 f, *cf.* 221 ff. The Minister added that special legislation might be passed in the future if it should prove that patent rights were abused in support of restraints of competition (*id.*, 227).

It should be noted in this context that compulsory patent licensing may be ordered pursuant to sections 15 and 17 of the Law on Patents, of 1884, which read:

*Section 15.* "Should, three years after the date on which a patent was granted, the patented invention not have been applied within the country on a scale commensurate with circumstances, any person who wishes to utilize the invention notwithstanding the existence of the patent may make the corresponding claim against the holder of the patent in a court of law. Should there be no valid reason for the failure to utilize the invention, the court shall decide, after due consideration, the extent to which plaintiff may utilize the invention and the compensation payable to the inventor."

*Section 17.* "Should the King deem it necessary that a patented invention shall be made freely available to all, or that the patent shall be utilized by the state, the patent rights shall constitute no obstacle. The owner of the patent shall, however, be entitled to full compensation. In the event of disagreement as to the amount of compensation, due judgment will be passed by a court of law."

[99] Note, PKF 1959, 59, at 61.

[100] *In re* Skånekretsen av Malt- och Läskedrycksförbundet v. AB Fructus Fabriker and Apotekarnes Mineralvattens AB, NFF 1955, 11. Basically the same approach was chosen by the Commissioner in dismissing the complaint—to the extent that it related to a trade-marked label—in the case *In re* Storvreta Bryggeri v. Apotekarnes Mineralvattens AB, PKF 1957, 107.

licensee claimed that the exclusive right to use the trade-marked label was essential to its business, as otherwise it would be uneconomic for the company to advertise the product extensively. The licensee also stressed that it was necessary in the brewery business to market only a limited number of brands, and exclusive rights to use branded products were therefore essential in order to realize this aim. The Commissioner, in dismissing the complaint, attached decisive importance to these arguments and to the fact that the complaining party could obtain similar and even the very same raw material for manufacture of the soft drink from other suppliers.

The law on the applicability of the antitrust law to trade-marks became settled by the decision of the Board in the leading case *Commissioner v. AB Fructus Fabriker,*[101] where, again, a refusal by the owner to license a trade-marked soft drink label to certain other manufacturers was deemed legitimate under the antitrust law. The Board, which in substance affirmed the distinction made by the Commissioner in the patent case referred to above between direct and indirect harmful effects, held generally that the licensing of trade-marks, while not sanctioned in law, was recognized in practice to be lawful. The Board then ruled that even if an enterprise traded in licenses extensively so that the license became a business product, action would not lie under the antitrust law if such enterprise applied discriminatory sales policies in respect of the trade-mark, since harmful effects resulting therefrom would be a direct consequence of the exercise of rights recognized by legislation to be exclusive.[102]

*3. Limitation of Territorial Applicability of the Law.* The antitrust law has been limited in the main to restraints of competition affecting the Swedish market. Thus, pursuant to section 6 of the Law of 1953, proceedings may be instituted against restraints of competition effected by Swedish exporters, or by Swedish industries abroad, only after permission by the King granted for the purpose of complying with treaty obligations, in situations where such restraints cause effects only outside of Sweden.

Section 6 reads:

> "Without the permission of the King, negotiations may not concern effects outside Sweden of restraints of competition. Such permission may be granted only to the extent that may be required to ensure compliance with treaties concluded with foreign states."

Conversely, foreign subjects not doing business in Sweden, acting alone, may, because of lack of jurisdiction on the part of the Crown

[101] PKF 1959, 407.
[102] *Id.*, at 412 f.

under Swedish procedural law, freely effect even illegal restraints of competition on the Swedish market, and may therefore, e.g., require resale price maintenance of Swedish buyers,[103] or implement joint bid-tendering agreements with other foreign subjects. This was authoritatively made clear by the Minister in 1953, who was of the opinion that "harmful effects caused by foreigners within Sweden can only be prevented through international treaties."[104]

### E. Some Principal Features of the Enforcement of Swedish Antitrust Law

A study of the official records alone for the first six years during which the Swedish antitrust law system has been in operation (1954–1960) gives a clear picture of how successful it has been.[105] The statistical information reproduced at the end of this study conveys in some measure the same impression.

It is perhaps not surprising that the enforcement authorities are of the opinion that the present Swedish antitrust law is both effective and well suited to realize the ends which it has been designed to attain.

Thus, when in 1959 a motion was made in Parliament proposing that the antitrust statutes should be revised and that more effective enforcement of the policies upon which they rest should be made, the Commissioner, to whom the motion was referred for consideration, stated:

> "On the basis of the experience which has been gathered by this Office in the course of its work, it is the opinion of the Office of the Commissioner that the legislation has had much greater effects than one might be inclined to think, having regard to the partly voluntary form which has been chosen. Since the demands of the Board for elimination of harmful restraints of competition have by and large been met during the negotiations which have been conducted on the basis of the decisions of the Board, this Office therefore deems it convenient to maintain the present legislation which is based on the principle of negotiation."[106]

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[103] *Cf.* the Board's dictum in Petition by AB Svenska Warnerkompaniet, NFF 1955, 1, at 2. Evidently, a Swedish wholesaler buying products from a foreign firm pursuant to a contract establishing fixed *retail* prices cannot legally implement this requirement vis-à-vis Swedish purchasers, *cf.* Crown v. Johnson Brothers, PKF 1959, 193 (Stockholm Town Court criminal case). Similarly, an agreement which conflicts with the criminal provisions of the antitrust law is probably not enforceable in Swedish courts as being contrary to "ordre public."

[104] Kungl. Maj:ts prop. 103/1953, 216 f.

[105] The success has been particularly great as a result of voluntary actions on the part of private enterprise and their organizations and associations who have done much to promote what are commonly called "sanitary measures" within their own ranks.

[106] NO:s utl. över Statens pris- och kartellnämnds utl. t. Riksdagens andra lagutskott över motionerna I : 325 och II : 397 om översyn av pris- och kartellagstiftningen m.m., PKF 1959, 247, at 250.

The Board, in considering the same motion, made the following statements which significantly coincide with those of the Office of the Commissioner:

> "On the basis of the experience which has been gathered by the Board in the comparatively short time during which it has been active, the Board wishes to state as its definite opinion that the best solution from various points of view would be to maintain the present legislation which is based on the principle of negotiation. If, as hitherto, the decisions of the Board are met with understanding, and if the demands that the Board makes for elimination of harmful restraints of competition are by and large accepted by the enterprises and associations concerned, the present system offers many advantages as compared with compulsory rules. The experience which has so far been gathered of the present system cannot, in the opinion of the Board, be said to support the contention that the present legislation is insufficient and that the hopes to achieve positive co-operation between the Government and industry and commerce in this field which were expressed at the time of the enactment of the legislation have not in fact been realized.
>
> "Being of this opinion, the Board considers that a review of the antitrust legislation should not be made under present conditions."[107]

The latest expression of the Government's over-all attitude to the antitrust law is the instruction to the 1960 Price Supervision Committee, which limited its mandate to specified matters and problems falling wholly within the framework of the present system.[108] As previously noted, the Committee recommended that the staff of the antitrust authorities be increased in order to permit more active enforcement, but though outlining a broad and varied program for intensified efforts to this end, the Committee, in spirit, followed the trend of attaching primary importance to the retail trade and to consumer goods in a limited sense of this word, with particular emphasis on continuous supervision of price levels.[109]

Against this background, a few critical remarks may be made on some principal features of the antitrust enforcement.

Swedish antitrust law grew out of efforts to break up heavy cartelization in industry and commerce. Thus, the first legislative measure which was taken after World War II was the establishment of a cartel regis-

[107] Näringsfrihetsrådets utl. t. Riksdagens andra lagutskott över de vid 1959 års riksdag väckta likalydande motionerna I : 325 och II : 397 om översyn av pris- och kartelllagstiftningen m.m., PKF 1959, 261, at 262–263; *cf.* Utl. av Näringsfrihetsrådets ordf. till Nordiska Rådets presidium . . . , PKF 1961, 139, at 140.

[108] SOU 1961: 3, 39.

[109] *Id.*, 70 and *passim; cf.* note 29 *supra.*

ter[110] which was intended to serve as a basis for future enforcement action. When two comprehensive reports[111] were made on the cartel register in 1958, twelve years after the enactment of the Law of 1946, it was stated, however, that the statistical analysis made of the then registered agreements (1,726 in number, of which 841 were no longer in force, leaving a total of 885 agreements still in effect)

> "is of limited value since it is not known how accurately the cartel register evidences the actual existence of agreements in industry and commerce. Since registration is not compulsory except upon request, no information is available on the total number of cartel agreements. Certain business fields may be over- or underrepresented in the cartel register depending on the policies which have been adhered to by the registration authority."[112]

The statistical survey of the activities of the Commissioner which appears at the end of this study shows a sharply declining curve in the category of *ex officio* investigations of cartel agreements. In fact, very few actions have been instituted against cartel arrangements.[113] Instead, the Commissioner has acted mostly on complaints brought by private parties, and this accounts for the rather lop-sided direction that enforcement has taken, described in detail particularly under C above; its main targets have been retail trade in consumer goods, and cartel restrictions on new business or professional establishment. The effects have been significant and no doubt beneficial, but only within limited areas which perhaps in the final analysis are of comparatively minor significance in the economy at large.

In these and other respects, it seems that antitrust enforcement, if it is to become truly effective, needs to be intensified and somewhat greater emphasis should be given to actions in other fields, such as industrial cartelization, if not cartelization generally,[114] and must likely also pay greater attention to monopolistic trends[115] in the financial sphere.

A new approach along these lines would affect only the enforcement, and not the structure of the system as a whole. Swedish antitrust law is timid: it is largely built upon the assumption that private enterprise

[110] *Cf. supra,* at notes 12 and 13.

[111] Andrée, Registrering av konkurrensbegränsande överenskommelser, PKF 1958, 333–338; Modin and Sandberg, Det registrerade avtalsbeståndet åren 1947–1957, PKF 1958, 338–348.

[112] *Id.,* at 348.

[113] *Cf. supra* under C 2.

[114] *Cf.* NO:s yttrande till Chefen för Handelsdep. över SOU 1961 : 3, PKF 1961, 134, at 134 f.

[115] The 1960 Price Supervision Committee proposed that investigations should be made of institutional "deficiencies" in the economy, such as dominance of monopolies or oligopolies. The Board has expressed its agreement with this view, see Näringsfrihetsrådets yttr. t. Chefen för Handelsdep. över SOU 1961 : 3, PKF 1961, 142, at 144.

will voluntarily abide by decisions of the authorities, it rarely backs up the rules by sanctions, and it stops at Sweden's territorial borders. Swedish antitrust law, however, is flexible and adaptable to new demands which can conveniently be channelled through a smoothly functioning institutional organization. And above all, the very informality of the enforcement procedure admits of fresh initiative which will, if dynamically and imaginatively administered, continue to build up, in the true spirit of creative case law, a jurisprudence which gives concrete legal shape to basic principles of free competition.

Thus handled, Swedish antitrust law will in ever increasing measure emerge from its present status of smooth and efficient Government administration, working as an arm of the officious welfare state, and become a full grown branch of the law, elaborated in close touch with modern economic conditions.

STATISTICAL SURVEY OF THE ACTIVITIES OF THE FREEDOM OF COMMERCE BOARD 1954—31ST OCTOBER, 1960

Information published in SOU 1961: 3, 159

| | 1954 | 1955 | 1956 | 1957 | 1958 | 1959 | 1960 | Total |
|---|---|---|---|---|---|---|---|---|
| *The number of demands for institution of proceedings with a view to eliminating the harmful effects of restraints of competition* | 4 | 11 | 5 | 7 | 8 | 5 | 1 | 41 |
| The number of these cases: | | | | | | | | |
| 1) which have been dismissed because the restraint of competition has been eliminated before a decision has been rendered by the Board: | 3 | 6 | 4 | 4 | 3 | 1 | .. | 21 |
| 2) which have been subject to negotiations with a view to eliminating the restraint of competition and have been eliminated or modified in a satisfactory manner: | .. | 1 | 1 | 2 | 2 | .. | .. | 6 |
| 3) which have been dismissed by the Board: | 1 | 4 | .. | 1 | 3 | 2 | 1 | 12 |
| 4) which were still under consideration at the end of the year: | .. | .. | .. | .. | .. | 2 | 2 | .. |
| *The number of petitions for waiver of the prohibition against fixed resale prices and against joint consultation in giving tenders or bids* | 11 | 2 | 1 | 1 | .. | 1 | 3 | 19 |
| The number of these petitions: | | | | | | | | |
| 1) which have been dismissed because permission of the Board has not been deemed necessary: | .. | 1 | .. | .. | .. | .. | 1 | 2 |
| 2) which have been granted: | 5 | 1 | 1 | 1 | .. | 1 | 2 | 11 |
| 3) which have been denied: | 6 | .. | .. | .. | .. | .. | .. | 6 |
| *Number of remissutlåtanden, etc.* | 4 | 6 | 2 | 3 | 4 | 3 | 3 | 25 |

## STATISTICAL SURVEY OF THE ACTIVITIES OF THE OFFICE OF THE FREEDOM OF COMMERCE COMMISSIONER 1954–1960

Information published in NFF 1955–1956 and in PKF 1957–1961

| | 1954 | 1955 | 1956 | 1957 | 1958 | 1959 | 1960 |
|---|---|---|---|---|---|---|---|
| *Total number of agreements included in the Cartel Register which have been examined* | 46 | 38 | 56 | 32 | 10 | 24 | 25 |
| The number of these agreements: | | | | | | | |
| 1) which have been cancelled or satisfactorily modified whereupon the Commissioner's examination has been closed: | 25 | 4 | 25 | 10 | 2 | 4 | 7 |
| 2) the effects of which have been deemed either unimportant or more suitable for examination in another context: | 6 | 2 | 3 | 7 | .. | 1 | 6 |
| 3) which have caused a demand to be made by the Commissioner for the institution of proceedings before the Board: | 2 | 2(4) | 1 | 3 | .. | .. | 2 |
| 4) which were still under examination at the end of the year: | 13 | 28 | 27 | 12 | 8 | 9 | 10 |
| *Total number of complaints of private parties which have been examined* | 69 | 95 | 104 | 119 | 154 | 149 | 148 |
| The number of these complaints: | | | | | | | |
| 1) which have been dismissed because the restraint of competition has been eliminated: | 16 | 16 | 27 | 29 | 22 | 28 | 32 |
| 2) which have been dismissed for formal or other reasons: | 2 | 5 | 6 | 6 | 2 | 7 | 5 |
| 3) which have been dismissed because the Law of 1953 was not deemed to apply to the particular restraint of competition complained of: | 13 | 17 | 18 | 21 | 47 | 44 | 58 |
| 4) which have been temporarily shelved because it has been deemed preferable to handle them in another context: | 7 | 8 | 3 | 9 | 1 | 2 | .. |
| 5) which have caused a demand to be made by the Commissioner for the institution of proceedings before the Board: | 11 | 5 | 3 | 7 | 7 | 4 | .. |
| 6) which have been withdrawn: | 1 | 1 | .. | 1 | 8 | 12 | 9 |
| 7) which were still under consideration at the end of the year: | 19 | 43 | 47 | 46 | 67 | 52 | 44 |
| *The number of cases which have been examined ex officio on the basis of newspaper reports, etc.* | 2 | 2 | 4 | 1 | 4 | 4 | 10 |
| *The number of cases in which an advance opinion of the Commissioner has been requested.* | 1 | .. | .. | .. | .. | 1 | .. |
| *The number of cases where the opinion of the Commissioner has been demanded by the Board concerning requests for waiver of prohibition against fixed resale prices, or against joint bids and tenders, etc.* | 14 | 3 | 2 | 1 | 1 | 2 | 4 |
| *The number of written inquiries and the like which have been handled* | 36 | 20 | 20 | 47 | 46 | 31 | 24 |
| *The number of cases which have been referred to the Commissioner by the Price and Cartel Office.* | .. | 9 | 8 | 4 | 17 | 15 | 13 |
| *The number of letters addressed by the Commissioner to Offices of Provincial Governors.* | .. | 2 | .. | .. | .. | .. | .. |
| *The number of violations of the prohibition against fixed resale prices or joint bid-filing which have been complained of by the Commissioner.* | .. | 7 | .. | 2 | 18 | 4 | 4 |
| *The number of "remissutlåtanden" which have been submitted by the Commissioner to Government authorities.* | .. | 4 | 2 | 3 | 5 | 3 | 4 |

GEORGE GINSBURGS

# Objective Truth and the Judicial Process in Post-Stalinist Soviet Jurisprudence

Ever since Stalin's death, Soviet law and jurisprudence have been undergoing a constant process of revision and reappraisal, practical reform and doctrinal re-evaluation. One of the most interesting, and significant, theoretical debates, with far-reaching practical implications in Soviet court practice, has revolved around the concept of "truth" in legal processes, namely, the inherent relationship between the nature of judicial decision and social reality. The widespread controversy in Soviet legal circles on this vital topic has encompassed all areas of juridical thought, ranging from Marxist philosophical fundamentals to questions of procedural guarantees and, in one way or another, touching on most substantive aspects of jurisprudential doctrine and judicial behavior, thus giving the present discussion an importance far transcending the immediate technical values of the legal principles being appraised.

In the avowed belief that "the problem of truth in the theory of judicial evidence constitutes the focal point where jurisprudence and epistemology have always merged,"[1] the current debate has involved a general re-examination of the following propositions: (1) what is the nature of the truth which is accessible *ex principio* to man's mind, i.e., a basic elaboration of the epistemological theories held by exponents of the Marxian philosophical school; (2) do the rules and conclusions of these epistemological doctrines also comprehend the field of human social endeavor and, in particular, judicial activity; (3) if so, what is the nature (or type) of truth embodied in a judicial decision; (4) what are the criteria for determining whether a given court ruling conforms to the truth of the matter; and (5) what practical methods should be implemented in order to ensure the attainment of said truth in all court decisions.

Starting from broad philosophical issues rooted in the cardinal problem of the theory of human knowledge with the question of the accessibility of concrete truth to human comprehension, the current analysis

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[1] A.A. Starchenko, "Problema obyektivnoi istiny v teorii ugolovnogo protsessa," (The Problem of Objective Truth in the Theory of Criminal Procedure), Voprosy filosofii, 1956, No. 2, p. 106.

of Soviet legal tenets thus gradually descends to the more immediate dilemma of the actual realization of these theoretical postulates in daily life through the formulation and enforcement of appropriate rules of substantive law and judicial procedure.

Central to all Marx-inspired philosophical systems is the proposition that "the dialectical materialist treatment of the problem of knowledge already presupposes in principle the presence of an objective reality independent of consciousness."[2] According to Soviet scholars, "Marxist-Leninist epistemology is based on an acknowledgement of the existence of an external material world, independent of human consciousness."[3] Assuming the existence and, concurrently, the logical and spatial primacy of the external material world over thought, Marxist theory logically proceeds to derive therefrom the conclusion that the substance of thought, i.e., the content of human consciousness, is determined by this physical milieu. In the final analysis, therefore, still according to the Marxists, man's ideas are entirely the product of his material environment (taken in its totality) and are stimulated and motivated by his external surroundings (the entirety of his human and social being), by which they are inspired and wholly conditioned. Matter is thus recognized as the final arbiter of the contents of human consciousness, though not, of course, of consciousness itself as a human faculty or as an attribute of human nature or, in general, of a higher biological form of life.

Premising the simultaneous and parallel existence and the organic interaction of external material conditions and human consciousness, Soviet philosophers are then forced to deal with "the second aspect of the relation between thought and being, namely the properly epistemological question, whether consciousness is or is not capable of reflecting being aright": "the knowability of matter constitutes the second aspect of the problem of relations of thought and being."[4] The answer of all official exegetes of Marxism to this fundamental point of doctrine is the same, patterned on the authoritative thesis that "Marxist philosophical materialism holds that the world and its laws are fully knowable, that our knowledge of the laws of nature, tested by experiment and practice, is authentic knowledge having the validity of objective truth, and that there are no things in the world which are unknowable, but only things which are still not known, but which will be disclosed and made known by the efforts of science and practice."[5]

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[2] Gustav A. Wetter, Dialectical Materialism, tr. from the German by Peter Heath, (New York, 1958) 489.

[3] E.g., G. Obichkin, Osnovnye momenty dialekticheskogo protsessa poznaniya, (Fundamental Aspects of the Dialectical Process of Knowledge), (Moscow-Leningrad, 1933) 5.

[4] G.A. Wetter, *op. cit.*, 490, 498.

[5] J. Stalin, "Dialectical and Historical Materialism," Problems of Leninism, (11th ed.; Moscow, 1953) 722.

In the Marxist philosophical lexicon, the concept of the "true" is defined as the quality of an accurate reflection, both general and particular, of external reality in human thinking.[6] This correspondence, it is made clear, is not a symbolic approximation or a qualitatively partial and incomplete mental representation of objectively existent things outside the human intellect, but the full and true "mirroring" of the physical world in human consciousness (the so-called "copy-theory"). Dismissing relativists, scepticists, agnosticists, pragmatists, subjectivists, and idealists alike, Marxist philosophy thus proclaims the complete accessibility of objective reality to human knowledge. Man's ideas, it holds, are derived from his material surroundings and his physical experience, and his thoughts are faithful amalgamations through mental activity of the reality in which he functions, internally processed by his comprehension, it is true, but nonetheless capable of being undistorted representations in the abstract of the real conditions which motivated them in the first place. No truth can therefore exist, according to this viewpoint, which is not ultimately distilled from some identifiable material element—this precludes the possibility of all so-called truths of an "idealistic nature," products of "pure" thought or the abstract exercise of "reasoning powers,"—and, conversely, no truth can exist of which human understanding is not eventually attainable.

Within this philosophical frame of reference, the next question with which Soviet theoreticians are faced concerns the character of the truth communicated in an idea which enunciates a reality accurately perceived by human consciousness. As distinct from most other philosophical schools, the Marxian doctrine of knowledge has consistently defended the thesis that the nature of the truth arrived at in man's thought processes is objective truth in that it is a genuine and unadulterated representation in mental form of the existing material environment. Truth, in the Marxist sense, is, consequently, the corollary of a special moment in the incessant process of interaction of being and thought, an attribute of various stages of brief equilibrium in the interplay between matter and consciousness in the course of the ascendant progression of history's dialectical chain. Elucidating the crux of the teaching of dialectical materialism on objective truth, Lenin formulated this proposition as follows: "The discussion is not in the least concerned with the immutable substance of things or with unchanging consciousness, but with the *correspondence* between the consciousness reflecting nature and the nature reflected by consciousness."[7]

[6] M. Rosental and P. Yudin (eds.), Kratkii filosofskii slovar, (Concise Philosophical Dictionary), (4th ed.; Moscow, 1954) 201; *idem*, Kratkii filosofskii solvar (Concise Philosophical Dictionary), (4th rev. ed.; Moscow, 1955) 165.

[7] V. I. Lenin, "Materializm i empiriokrititsizm," (Materialism and Empiriocriticism), written in 1908, first published in May, 1909, Sochineniya, (Collected Works), 4th edition, (Moscow, 1947), Vol. 14, p. 124.

For the Marxists, therefore, truth is the quality of thought which results from a particular relationship between thought and reality, namely, the correct "mirroring" in thought of the law or the fact of nature which it is striving to fathom and/or explain. It is, in other words, that property of thought which is the product of a momentary consonance of being and consciousness, a situation of exact superimposition of one over the other, which must be, and is, constantly disrupted, and then restored at the next highest historical level, by the unrollment of the dual, but withal organically unified, chain of dialectical evolution operating within both matter and thought.

This objective truth, being a quality of the dialectical process of cognition is itself, according to Soviet ideology, subject to the laws of dialectical development and compounded, in turn, of two apposites, "absolute" truth and "relative" truth, albeit the terms "absolute" and "relative" are used in this context in a different sense from the one generally given them in contemporary philosophy. Under "absolute" truth, Marxist doctrine envisages "a total, integral, final knowledge of the objective material world or of a given aspect or law of this world."[8] In other words, it is said to be "an absolutely exact agreement of thought with its object, i.e., a content of our knowledge such that neither now nor in the future, in consequence of the further development of knowledge, can it ever be proved false."[9] "Absolute" truth, then, as seen by exponents of dialectical materialism, is the quality of the ultimate solution furnished by the last phase of a given chain of dialectical synthesis, or, stated differently, it is the attribute of a human thought enunciating a rule which is itself the culmination or end product of the dialectics of historical progression in some field, not open to any further amendment or revision and formulating an integral and complex law of nature admitting to no exceptions. Consequently, such a truth is in the nature of a general principle of development of man or matter in its conclusive resolution, and its very absoluteness is a function of its finality: it is, therefore, a static truth in that it is an end verity.

"Relative" truth, on the other hand, is not seen as relative from some qualitative point of view in the sense of being merely an approximate reading of the essential facts or meaning of some facet of reality, nor relative in the Kantian sense of denoting the impossibility of the "thing-in-itself" ever being fully perceived by the human mind regardless of the time and effort spent on the endeavor. It is "relative" in that such a truth is a particular truth (as distinct from an "absolute" truth of general import), a limited truth because answering only some special, strictly circumscribed question, objective in every way, of course, and

[8] M.L. Shifman, Osnovnye voprosy teorii sovetskogo dokazatelnogo prava, (Basic Questions of the Theory of Soviet Law of Evidence), (Moscow, 1956) 24.

[9] M.N. Rutkevich, Praktika—osnova poznaniya i kriterii istiny, (Practice—Basis of Knowledge and Criterion of Truth), (Moscow, 1952) 179.

certainly as objective as "absolute" truth, but differing from the latter in that it does not enunciate an all-inclusive, exhaustive, and definitive solution of a given complex problem. It is, strictly speaking, a truth which is partial as to subject matter, scope, and historical content, and moreover, remains open to further dialectical synthesis.

In the Marxist epistemological system, the two types of truth are not juxtaposed to, or invidiously contrasted with, each other. The framework of their organic relationship, as defined by Lenin, is based on the principle that "human thought by its nature is capable of giving and gives us absolute truth which is compounded of a sum-total of relative truths."[10] "Relative" truth, in the Marxian lexicon, is, accordingly, taken to constitute a "moment or stage in the knowledge of absolute truth,"[11] because "absolute truth stands to the relative as the whole to the part."[12] Indeed, it is said, "absolute truth is truth which human knowledge attains only after crossing the level (levels) of relative truth (truths)," while "relative truth is the phase through which knowledge of the phenomena of nature and society must pass on the way to absolute truth."[13]

As a result, Soviet philosophers regard both concepts of "truth" as equally objective, both as entirely accurate for their own time and place. One kind of truth is recognized as an integral and necessary component of the other, and the difference between them is never drawn in terms of quality, of "absolute" truth being a better type of truth, but of substantive quantity, with "absolute" truth resolving *in toto* and for all eternity all possible dilemmas posed by some general law of life, and "relative" truth answering *in toto* some particular problem for its own historical period. Therefore, whereas "absolute" truth is eternal, unchangeable, and immovable, "relative" truth, on the other hand, is the only possible truth for the given moment of social evolution and the level of development of human cognition at that point in time and space: in short, it represents an "absolute" truth in its own limited milieu, but remains "relative" in the context of the dialectical infinity of human history and could, perhaps, be best described as a "relatively absolute" truth, except that the expression is not used by Soviet theoreticians.

Thus, it would seem that Marxist philosophy envisages "relative" truth as a microcosmic particle of "absolute" truth and, conversely, that

[10] V.I. Lenin, *loc. cit.*, 122.

[11] F.I. Khaskhachikh, Materiya i soznanie, (Matter and Consciousness), (Moscow, 1951) 177.

[12] *Ibid.*

[13] N.N. Polyanskii, Voprosy teorii sovetskogo ugolovnogo protsessa, (Questions of Theory of Soviet Criminal Procedure), (Moscow, 1956) 114–115. *Cf.* V.I. Lenin, Filosofskie tetradi, (Philosophical Notebooks), (Moscow, 1947): "The reflection of Nature in human thought must be envisaged, not as 'dead,' or 'abstract,' or static, or free from contradiction, but as an eternal process of movement, in which contradictions are forever emerging and being resolved," (p. 168).

"for objective dialectics there is an absolute even *within* the relative."[14] As a result, according to this mode of thinking, "relative" truth cannot in any way be equated with a high degree of probability nor even with maximum probability, the latter concept evidencing only an incomplete and unconsummated effort to achieve either "absolute" or "relative" truth, but actually falling far short, qualitatively and quantitatively, of either of them. The distinction between even "relative" truth and probability, Soviet sources make clear, is not one of degree, but really one of kind, probability, no matter how certain, always remaining only a partial truth and, consequently, a partial falsehood, and therefore not a truth at all *stricto sensu*.[15]

In Soviet legal and philosophical literature, the expression "absolute" truth is sometimes also used to denote a bare statement of fact devoid of any intrinsic analytical element, such, for example, as the proposition that "Paris is in France," or "Napoleon died on May 5, 1821," etc. While often referred to as "absolute" verities because they are viewed as not open to reasonable doubt and, indeed, are said to be a class of assertions the veracity of which could only be doubted by fools and lunatics, in practice such expressions of bare fact are usually not deemed important enough to merit discussion in connection with philosophical categories of truth. More frequently, they are simply acknowledged as "platitudes," even though it is often conceded that the establishment of such "platitudes" is not always without a margin of complexity and is, in fact, occasionally rendered quite difficult by lack of sure knowledge of all the circumstances surrounding the descriptive equation that, on the face of it, appears self-evident.

For the participants in the debate currently in progress in the USSR, there is no question but that the main propositions of the philosophical methodology outlined above are directly pertinent to the problem of the character of the truth disclosed in Soviet judicial proceedings. Indeed, for the convinced Marxist, human relations merely represent a facet, albeit a very important and active facet, of the superstructure, the "social organization" erected on the basis of, and determined by, "the prevailing mode of economic production and exchange"[16] of a given community at a particular point of its history. Since the evolution of the

[14] V.I. Lenin, *op. cit.* (note 13) 328.

[15] M.S. Strogovich, Uchenie o materialnoi istiny v ugolovnom protsesse, (Doctrine of Material Truth in Criminal Procedure), (Moscow-Leningrad, 1947) 66–100; A. Rivlin, "Ponyatie materialnoi istiny v sovetskom ugolovnom protsesse," (The Concept of Material Truth in Soviet Criminal Procedure), Sotsialisticheskaya zakonnost, 1951, No. 11, p. 51, (henceforth abbr. as *SZ*); A.I. Trusov, Osnovy teorii sudebnykh dokazatelstv (kratkii ocherk), (Bases of the Theory of Court Evidence, Brief Outline), (Moscow, 1960) 17: "Indeed, if authentic truth is declared to be inaccessible to the judge, then, in criminal procedure it ceases to be the aim of evidence. In these conditions, the objective of proof becomes probability, in practice difficult to distinguish from ordinary suspicion."

[16] F. Engels, Preface (1888) to K. Marx and F. Engels, The Communist Manifesto.

economic foundation is regulated by definite dialectical laws of nature fully accessible to human perception, the socio-political patterns of human organization reflecting the underlying economic forces are, in turn, subject to the self-same rules of change of which, too, the human mind can be cognizant. Finally, since judicial endeavor is but an aspect of man's social activity, it also is ruled by the same comprehensible processes, for "since the world and its laws can be known, then there are no grounds to deny the possibility of knowledge of real truth in a judicial case."[17]

As a result, the concept of the cognizable nature of objective truth, the latter understood as a full and complete grasp of material reality by man's consciousness either at a particular stage of historical development or in terms of the infinite, is integrally transposed first into the realm of human knowledge of the laws of social life and, from there, to that part of human existence which constitutes its judicial relations. In the latter context, this objective or, as it is sometimes called, material truth[18] is defined as "the complete and accurate agreement with reality of the conclusions of the investigation and the court concerning the circumstances of the criminal act under examination, concerning the guilt or innocence of those faced with criminal charges."[19] Thus, from the very beginning of the Bolshevik experiment in Russia, the avowed goal of all judicial proceedings has always been, ostensibly, the establishment of unshakeable truth in every case, and nothing short of that, in line with the official demand that "every court must find the truth. . . . the result of every trial must be disclosure of the truth by the court."[20]

The proposition that the truth ascertained in a judgment is "objective" truth is now no longer open to doctrinal dispute, but is at present unanimously endorsed by all Soviet philosophers and jurists. Such, however, was not always the case in former years, before most manifestations of Soviet conduct and thought had become so rigidly standardized. At one time, quite early in the legal history of the Communist regime, it was permissible for a prominent Russian legal expert to insist that "the principle of material truth must be restricted in its practical applica-

[17] M.L. Shifman, *op. cit.*, 24; M.S. Strogovich, Materialnaya istina i sudebnye dokazatelstva v sovetskom ugolovnom protsesse, (Material Truth and Court Evidence in Soviet Criminal Procedure), (Moscow, 1955) 68; A.A. Starchenko, Logika v sudebnom issledovanii, (Logic in Court Investigation), (Moscow, 1958) 30.

[18] The terms "objective" and "material" truth are used synonymously in Soviet legal literature and are, in fact, interchangeable. Preference for the epithet "material" as denoting a clearer opposition to "formal" truth in judicial work is to be found in the works of Strogovich almost exclusively, other Soviet legal authors finding "objective" a more orthodox concept in the light of Marxist philosophy.

[19] M.S. Strogovich, *op. cit.*, (note 15) 14; *idem*, Ugolovnyi protsess, (Criminal Procedure), (Moscow, 1940) 114; M.M. Grodzinskii, Uliki v sovetskom ugolovnom protsesse, (Evidence in Soviet Criminal Procedure), (Moscow, 1944) 3.

[20] A.Ya. Vyshinskii, Sudebnye rechi, (Court Speeches), (Moscow, 1938) 10–11, in prosecuting Court workers in Leningrad accused of taking bribes and abuse of power before the Supreme Court of the RSFSR in 1924.

tions."[21] From this it was deduced that "authentic, unquestionable truth is not accessible to a court,"[22] that "truth can never be fully established since always only a certain portion of the facts underlying it is checked," and therefore, that "normally, in judicial cases one has to be satisfied with a more or less high degree of probability."[23]

Besides this view verging on highly un-Marxist philosophical subjectivism and, in fact, subsequently denounced as such,[24] another school of thought sought to deny the relevancy of the concept of "objective" truth to judicial behavior or the possibility of arriving at such a truth in a legal judgment not on philosophical grounds but from purely practical considerations: procedural restrictions of judicial work and on the admissibility of evidence presented to a tribunal; deadlines and other routine limitations of procedure were cited, for instance, to bolster the claim that for judicial decision, not "objective" truth in one form or another, but simply a high degree of probability is requisite. A feeling of well-founded conviction arising from the scrupulous and logical examination of the evidence could, according to adherents of this viewpoint, perhaps be demanded of judges before deciding, but that was all that could be expected of them, given the very nature of the judicial function and its *modus operandi*.[25] This interpretation, too, has since been rejected as fundamentally incorrect and abandoned even by its originators.[26]

Even if it is granted, that the truth established in Soviet court proceedings is "objective" truth, the problem is not thereby exhausted. Conceivably, the attainment of "objective" truth could be conceded with respect to the establishment of the actual facts of a case before the tribunal; the physical human acts which gave rise to the situation before the court possibly can be ascertained as they occurred in real life. But what of the court's qualification of these actions under the law, stated in a judgment similarly arrived at, the whole undertaking representing, in the last analysis, nothing but man's application of man-made law to man-evaluated events?

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[21] M.A. Cheltsov-Bebutov, Sovetskii ugolovnyi protsess, (Soviet Criminal Procedure), (Kharkov, 1929), Vol. 2, 29.

[22] M.S. Strogovich, *op. cit.*, (note 15) 56.

[23] M.A. Cheltsov-Bebutov, *op. cit.*, 100–101.

[24] M.S. Strogovich, *op. cit.*, (note 15) 55–56, 73–74.

[25] Elements of this argument may be found in M.A. Cheltsov-Bebutov, *loc. cit.* They were later elaborated in S.A. Golunskii, "O veroyatnosti i dostovernosti v ugolovnom sude," (Concerning Probability and Authenticity in Criminal Trial), Problemy ugolovnoi politiki, (Problems of Penal Policy), (Moscow, 1937), Vol. IV, p. 59ff; A.Ya. Vyshinskii, "Problemy otsenki dokazatelstv v sovetskom ugolovnom protsesse," (Problems of Evaluation of Evidence in Soviet Criminal Procedure), *ibid.*, 19–20; V.S. Tadevosyan, "K voprosu ob ustanovlenii materialnoi istiny v sovetskom protsesse," (On the Question of Establishing Material Truth in Soviet Procedure), Sovetskoe gosudarstvo i pravo, 1948, No. 6, pp. 65–72.

[26] Although Vyshinskii eventually retreated from his original position, he never openly disavowed his earlier views and until the very end his stand remained highly

For most Soviet lawyers, these aspects of the judicial function are regarded as an integral part of the process of judicial ascertainment of the truth, whereas in the non-Communist world, they are generally considered as the predominantly non-factual phase in the formulation of conclusions subjectively deduced from the array of evidence. At most, the formulation of "legal truths" or "judicial truths" embodying the correct choice and application of the appropriate legal provision to the defendant's conduct as weighed by the competent public authorities, has been regarded in the West as a highly synthetic and personal process. Soviet jurisprudence, however, offers an entirely different interpretation, the very notion of "legal" or "judicial" truth being rejected *in toto* as a formalistic and artificially contrived conception having nothing in common with genuine truth.

In fact, the very rationale underlying the materialistic interpretation of the inanimate and organic world inevitably leads Soviet jurists to a conclusion diametrically opposed to that of the proponents of the so-called "legal truth" thesis. This is particularly evident in the approach to such matters as the weighing of evidence, the correct conceptualization under the law of the defendant's behavior, and the justice of the decision. In these matters, most Soviet jurists hold,[27] the function of the court is not intrinsically subjective, but continues to be motivated by the same dominant effort to arrive at "objective" truth, a goal not essentially different from that sought in the initial stage of the case in discovering the material elements of the *corpus delicti*. The focal point of divergence in the viewpoints of the Marxist-Leninist and non-Marxist jurists on this

ambiguous. Thus, in a lecture on May 18, 1948, he declared that Strogovich's views on "material truth" as expounded in his 1947 work, "in spite of the errors and inaccuracies which may be found in the book, are closer to the truth than the position of his opponents," "O nekotorykh voprosakh teorii gosudarstva i prava," (Concerning Certain Questions of the Theory of State and Law," Voprosy teorii gosudarstva i prava, (Questions of Theory of State and Law), (2nd ed.; Moscow, 1949) 407. As late as 1950, however, he still wrote: "In 1937, in the article 'Problems of Evaluation of Evidence in Soviet Criminal Procedure,' I took a position denying the desirability or feasibility of demanding that the court establish absolute truth, for the 'conditions of court work compel the judge to solve the problem not from the standpoint of absolute truth, but from that of maximum probability (or, more correctly: from the standpoint of credibility.—A.V.) of specific factors that are subject to assessment by the court.' I still hold this viewpoint. To *demand* from a court that its decision represent *absolute truth* is obviously impracticable in the conditions of court work. . .", Teoriya sudebnykh dokazatelstv v sovetskom prave, (Theory of Court Evidence in Soviet Law), (3rd ed.; Moscow, 1950), p. 201. V.S. Tadevosyan now endorses the thesis that the truth enunciated in a Soviet court judgment is a "relative" truth based on authentic, not probable, knowledge, see the discussion of Strogovich's 1955 work in Sovetskoe gosudarstvo i pravo, 1956, No. 4, p. 141.

[27] S.V. Trusov, *op. cit.*, 22–29; A.L. Rivlin, "Zakonnost i istinnost sudebnogo prigovora," (Legality and Truthfulness of a Court Judgment), Sovetskoe gosudarstvo i pravo, 1957, No. 7, pp. 114–118; *idem*, Peresmotr prigovorov v SSSR. (Review of Sentences in the USSR), (Moscow, 1958) 11–31; M.I. Bazhanov, Izmenenie obvineniya v sovetskom ugolovnom protsesse, (Revision of Charges in Soviet Criminal Procedure), (Moscow, 1956) 26–27.

crucial issue lies in their totally dissimilar conceptualization of the nature of law itself.

Non-Marxist lawyers, not of a rigid natural law persuasion, commonly agree in viewing law as a product of human or societal will, a pragmatic instrument devised by human thought and gradually improved through social experimentation for ends regarded as desirable by the community in which it obtains. Since the content of the existing law, therefore in this view, is an expression of applied human discretion or wisdom, the enforcement by a court of a given legal provision, however accurate or justifiable in the procedural or substantive sense, *ex principio* can never represent more than a correct legal evaluation of the accused individual's conduct, in accordance with society's estimate of the proper criteria for safeguarding its values at that stage of historical development.

*A contrario,* for Soviet jurisprudence, on the other hand, the only acceptable justification for judicial decision or practice is not its consonance with what the functional milieu at the time deems judicially expedient, but instead its basic agreement with the inevitable course of historical evolution. From the Marxist-Leninist standpoint, law so-called, which is not sanctioned by the scientific laws of nature, but is merely designed as a convenient man-created body of commands, consciously improvised for the temporary benefit of the ruling class, is not law *stricto sensu,* but simply a manifestation of organized public lawlessness. Law proper, according to the Soviet doctrine, is neither an abstract syllogism, nor a moral imperative, nor a discretionary exercise of communal will power, but rather a human (class) formulation of a material fact of life.[28] This is not to say that Soviet jurisprudence does not consider law a man-enunciated set of rules of personal and social behavior, for it certainly does so regard acts of legislation. However, while Soviet jurists do admit that in the final analysis positive law is a product of man's thought, they nevertheless claim that this fact does not deprive it of an intrinsic and dominant objective element.

Pursuant to this doctrine, Soviet ideology maintains that "law is a form of social consciousness" and that, in turn, "social consciousness mirrors social reality."[29] Furthermore, whereas in modern bourgeois

[28] B.V. Sheindlin, Sushchnost sovetskogo prava, (Nature of Soviet Law), (Leningrad, 1959) 5–51; M. A. Arzhanov, Gosudarstvo i pravo v ikh sootnoshenii, (State and Law in Their Interrelationship), (Moscow, 1960) 16–46. Also, I.E. Farber, O sushchnosti prava, (On the Nature of Law), (Saratov, 1959) 48: "Consequently the materialistic interpretation of juridical norms consists in that they are viewed as products of objective relations and, primarily, of production relations. With all that, the norm of law is not itself a social relation, it expresses, reflects, is determined by social relations and influences them, that is why juridical norms themselves, (as also social norms in general), represent a relatively independent category of phenomena of social life."

[29] E.g., Yu.K. Osipov, "K voprosu ob obyektivnoi istine v sudebnom protsesse," (Concerning the Question of Objective Truth in Court Procedure), Pravovedenie, 1960, No. 2, p. 122.

society the group consciousness of the ruling circles allegedly is distorted, on the other hand, it is claimed that in a proletarian community, "the norms of socialist law as one of the forms of social consciousness in the main correctly reflect reality."[30] The immediate implications of this doctrine for legal theory are two-fold. In the first place, Soviet legal authorities assert that in each case "the facts which must be weighed exist objectively." In the second place, a statute or provision of the code is said to be in the nature of a measuring-rod, a standard *sui generis,* through the correct application of which the courts are enabled in a criminal case to assess the precise degree of culpability of the accused. In other words, so the argument runs, even if these "various 'units of measure,' 'scales,' or criteria (moral, esthetic, etc.) are defined by men [law amongst them] . . . they are determined not arbitrarily, but are elaborated in accordance with men's given way of life and reflect the objective needs, interests of particular classes, social strata or groups of the population." Therefore, "insofar as the given norms and evaluative criteria are worked out and objectivized in man's thoughts, language, etc., to that extent they too have an objective existence."[31] And, since law is a variant of human expression in its social media of the objectively operating needs of the community, then "in order that a judgment or decision of a court be true, it is indispensable that it correspond not only with the facts of the case, but also with the legal norms in which reality is objectively reflected."[32]

An accurate application of the law, thus understood, will automatically lead, according to official exegetes of Marxism-Leninism, to disclosure of the material truth of the question to be decided by the tribunal, whereas, conversely, a misguided evaluation of the evidence by the court resulting in an unjustified verdict represents not only a formal breach of the legal norms, but, what is more, a palpable perversion of objective reality. Accordingly, it is evident that from the Soviet viewpoint an illegal act is not illegal only because positive law so provides but that it is *a priori* illegal since it constitutes a violation of the existing social order and of the socio-economic rules of communal existence obtaining independently of man's consciousness or will.[33] True

[30] *Ibid.*

[31] A.I. Trusov, *op. cit.,* 24–25.

[32] Yu.K. Osipov, *loc. cit.*

[33] It is on the basis of this doctrine that Soviet criminology until 1958 considered the concept of crime exclusively from the point of view of its material definition as a socially dangerous act with emphasis not on legal provisions but on objective consequences. Under the basic principles of 1958 the erstwhile monopoly of the "material crime" thesis has been amended by the inclusion of its formal aspect previously rejected as a "bourgeois" subterfuge. See, for instance, V.D. Menshagin (ed.), Ugolovnoe pravo, obshchaya chast, (Criminal Law, General Part), (4th ed.; Moscow, 1948) 275–282; P.I. Kudryavtsev (ed.), Yuridicheskii slovar, (Legal Dictionary), (2nd ed.; Moscow, 1956) 226–228; P. I. Bardin, K. P. Gorshenin, P.I. Kudryavtsev (eds.), Kratkii yuridicheskii slovar-spravochnik dlya naseleniya (Concise legal dictionary-almanac for the population), (Moscow, 1960) 341.

human comprehension of the inner workings of social and natural phenomena merely permits society to concretize these unformulated laws of the material world through codes and statutes and to couch them in a more operative form and, as a result, acts which are *ipso facto* "illegal" because they imperil the social order concurrently also become illegal in the practical formal sense. In short, in the final analysis legislation does not actually decide whether a given act is henceforth to be treated as illegal, since such behavior is already "illegal" (noxious) in the philosophical meaning of that term under the irrefutable laws of historical materialism; enacted law simply regularizes the social forms of repression of such incidents on the condition, of course, that it correctly formulates the laws of the external world.

Given this ideological framework, what then is the nature of the truth which Soviet courts are bound to seek to establish and, indeed, are deemed regularly to ascertain through their judgments? The problem is one which continues even today to provoke violent doctrinal controversy in Soviet legal circles. On the whole, it is possible to distinguish three main schools of thought on the subject, in addition to a number of subsidiary variants.

First, there are those who claim that the verity enunciated in a well-founded ruling of a Soviet court represents nothing less than an absolute truth, an expression of objective, material truth equally valid for all times and all men, and that, in any event, the very "juxtaposition of relative and absolute truth is not at all applicable to the truth of the facts and circumstances being established by the court."[34] Defenders of this viewpoint generally proceed from the assumption that judicial decisions are essentially theorems directly related to so-called philosophical "platitudes" in that they deal for the most part with factual situations capable of being exhaustively examined and conclusively resolved, albeit not all of the judicial process is ever equated with the mere establishment of facts and causal relationships.[35] Therefore, according to exponents of this thesis, for most purposes the major portion of any judicial operation can be subsumed under the Marxist-Leninist epistemological belief in the knowability of material events and, consequently, regarded as fulfilling the criteria of phenomena accessible to integral perception by human consciousness and, of course, judicial consciousness as well.[36] Although those upholding this interpretation differ among themselves

[34] M.S. Strogovich, *op. cit.*, (note 15), 76.

[35] *Ibid.*, 76–80; S.B. Kurylev, "Ponyatie materialnoi istiny v sovetskom pravosudii," (Concept of Material Truth in Soviet Justice), S.Z., 1952, No. 5, p. 37.

[36] A.A. Starchenko, *op. cit.*, (note 1), 110–114; *idem*, *op. cit.*, (note 17), 24–30; M.S. Strogovich, *op. cit.*, (note 17), 72–73; N.N. Polyanskii, *op. cit.*, 116; N.I. Savitskii and M.A. Arzhanov in a discussion of Strogovich's 1947 book held in the Institute of Law of the Academy of Sciences of the USSR in 1948, Sovetskoe gosudarstvo i pravo, 1948, No. 9, p. 82; A. Baimurzaev, "Ponyatie materialnoi istiny v sovetskom pravosudii," (Concept of Material Truth in Soviet Justice), S.Z., 1952, No. 5, p. 42.

on various other ancillary theoretical issues, they remain united in the view that the only proper and acceptable decision of a Soviet court is one expressing an absolute truth which is achieved "if the verdict is correct, if the circumstances and facts established by it agree with reality, i.e., with what actually occurred."[37]

A second and opposed viewpoint is that the truth embodied in a final decision of a Soviet court constitutes only a relative truth and that in no way can formulation of an absolute truth be attained through, or expected from, the work of the judiciary. Alternatively, two reasons are generally given in defense of the latter proposition. On the one hand, reference is made to the practical difficulties and numerous procedural restrictions circumscribing the scope of the investigation and evaluation of the infinite number of factors in one way or another potentially pertinent to the solution of a case.[38] On the other hand, certain philosophical considerations are adduced, primarily emphasizing that courts are never called upon to furnish answers to general problems of human development or to define fundamental laws of nature. As only such questions are conceived to lead to the formulation of absolute truths, according to this opinion, in principle the judiciary is entrusted merely with the settlement of very limited and particular incidents, somewhat akin yet qualitatively different from so-called "platitudes" and at the same time totally dissimilar from the basic dilemmas of dialectical evolution. On either ground the possibility of the court's arriving at some philosophical absolute verity[39] is precluded.

The third and it now seems the majority school of thought holds that the question of relative and absolute truth in philosophy in general and in the context of law in particular cannot be treated in terms of the bipolarization of truth as such, but must be premised on the organic unity of the two concepts within the dialectical schema. Proceeding from Lenin's *dictum* of the operation of the absolute within the relative, and *vice versa,* this group maintains the indissoluble interdependence within a single whole of the two species of truth. In other words, "Marxism-Leninism holds that between absolute truth and relative truth there is no insuperable distinction, that absolute truth is compounded of relative truths, and that relative truth contains within itself a grain of absolute truth" and that, therefore, "it follows from this that absolute and relative truth must be examined in a dialectical unity."[40]

[37] M.S. Strogovich, *op. cit.,* (note 15), 76; *idem,* Kurs sovetskogo ugolovnogo protsessa, (Course on Soviet Criminal Procedure), (Moscow, 1958) 173.

[38] V.S. Tadevosyan, *loc. cit.,* Sovetskoe gosudarstvo i pravo, 1956, No. 4, p. 141. The same opinion was shared by I. Mikhailovskaya and A.A. Piontkovskii, *ibid.* Earlier the same thesis was elaborated by Vyshinskii and Golunskii, *op. cit.*

[39] In particular, V.S. Tadevosyan, *loc. cit.,* (note 25).

[40] Yu.K. Osipov, *op. cit.,* 127; D.M. Chechot, "Razvitie printsipa materialnoi istiny v sovetskom grazhdanskom protsessualnom prave," (Development of the Concept of Material Truth in Soviet Civil Procedural Law), Materialy mezhvuzovskogo nauchnogo

However, though proceeding from a common premise, this school of thought is split into various doctrinal factions which fail to see eye to eye on certain incidental, but significant, points of legal theory and, as a result, reach widely diverging conclusions.

One wing, for example, noting the intrinsic oneness of the absolute-relative dualism in the dialectical process, argues from this that "in the question of the nature of truth in judicial functions, from a practical point of view the important factor is not whether it is absolute or relative, (such a formulation of the problem in the given instance being hardly appropriate anyway), but whether it is objective truth, i.e., represents the agreement of the court's deductions as expressed in its judgment or sentence with reality."[41] On the other hand, in some quarters, while acknowledging the indivisibility of the absolute-relative dichotomy it is held that in a judicial solution the relative element definitely predominates and consequently a judicial ruling is primarily a relative verity. This position is defended by its proponents on either of two grounds. One is the claim that while positive law is an objective reflection of material phenomena, nevertheless it is only a historically determined facet of the superstructure; consequently, judicial application of law in a specific instance cannot possibly represent anything more than a particularized enunciation of a relative truth.[42] Another faction instead contends that the absolute quality of a judicial decision relates only to the general progress of the science of law, which at any given moment of human development is a relative truth because it is conditioned by human knowledge of objective reality in itself not yet complete, being compounded of the individual instances of judicial activity. These are deemed to be directly associated with the process of attaining both relative and absolute truth in the field of law, but *per se* represent only closed quasi-"platitudes" not affected by the mechanics of internal dialectics or the historical chain of organic synthesis.[43]

Finally, a few Soviet jurists adhere to the view that the whole theoretical problem of the differentiation of truth into relative and absolute pertains solely to the field of natural science and that it is completely irrelevant to the sphere of jurisprudential doctrine or the proper functioning of the courts.[44]

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soveshchaniya na temu "40 let sovetskogo gosudarstva i prava i razvitie pravovoi nauki" (Materials of the Scientific Conference of Institutes of Higher Learning on the Subject of "40 Years of Soviet State and Law and the Development of Legal Science"), (Leningrad, 1957) 64; A. Kukarov, "Ponyatie materialnoi istiny v sovetskom ugolovnom protsesse," S.Z., 1952, No. 2, pp. 7–12.

[41] Yu.K. Osipov, *op. cit.*, 129; A. Piontkovskii, "Za dalneishuyu razrabotku sovetskoi teorii dokazatelstv v ugolovnom protsesse," (For the Further Elaboration of the Soviet Theory of Evidence in Criminal Procedure), S.Z., 1955, No. 7, p. 36.

[42] A.I. Trusov, *op. cit.*, 22–30.

[43] V.Ya. Dorokhov and V. S. Nikolaev, Obosnovannost prigovora v sovetskom ugolovnom protsesse, (Correctness of Sentencing in Soviet Criminal Procedure), (Moscow, 1959) 72–74.

[44] A.L. Rivlin in his various works cited above; V. Nikolaev, "Preodolenie nepravil-

As has been noted above, most Soviet jurists conceive that law in general, and socialist legislation in particular, tend to reflect external reality and, consequently, that law must be classified as an expression of objective truth, if only in its relative version. For the majority, therefore, every procedural step in judicial implementation of the law, examination of the facts, their qualification under the codes, adjudication, is regarded as an integral component of the process of discovering and enunciating a material verity. This school of thought, however, is not without its numerous critics.

Some members of the Russian legal profession, for instance, will acknowledge the validity of the "objective truth" criterion only in application to that portion of judicial work involving the ascertainment of the circumstances of the crime, but deny its relevance to the subsequent phases of judicial evaluation of the evidence and, *a fortiori,* to the process of sentencing. According to proponents of this variant, extension of the idea of "objective truth" to include the element of socio-juridical evaluation of the *corpus delicti* by the judge would unjustifiably broaden that concept; it would "in great measure lose its character of objective truth since the legal weighing of facts and the measure of punishment imposed by the court depend on the law in force at the time, on the attitude of the judges toward the acts being examined by them, and on a number of other circumstances."[45] On the other hand, some Soviet legal authors accept both the factual and the evaluative stages, but refuse to consider sentencing as part of the process of judicial determination of the truth, on the grounds that "the assignment of a penalty is a command, and the command can only be expedient or inexpedient, just or unjust, but not truthful or untruthful."[46]

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nykh teorii v ugolovnom prave—vazhnoe uslovie ukrepleniya sotsialisticheskoi zakonnosti," (Overcoming Incorrect Theories of Criminal Law—Important Condition for the Strengthening of Legality), Kommunist, 1956, No. 14, pp. 50–51; N.N. Polyanskii, *op. cit.,* 116, denies the relevance of the philosophical concepts of "absolute" and "relative" for judicial work, asserting that judicial cases are in the nature of "absolute truths" in the pseudo-sense of "platitudes." See, also, his Ocherk razvitiya sovetskoi nauki ugolovnogo protsessa, (Essay on the Development of Soviet Science of Criminal Procedure), (Moscow, 1960) 96ff.

M.A. Cheltsov, Sovetskii ugolovnyi protsess, (Soviet Criminal Procedure), (Moscow, 1951) 81–82, speaks only of objective truth without distinguishing it into its dialectical components.

[45] M.S. Strogovich, *op. cit.,* (note 17), 65; M.L. Shifman, *op. cit.,* 26–27, fn. 3; A.A. Piontkovskii and V.M. Chkhikvadze, "Ukreplenie sotsialisticheskoi zakonnosti i nekotorye voprosy teorii sovetskogo ugolovnogo prava i protsessa," (The Strengthening of Socialist Legality and Certain Questions of Theory of Soviet Criminal Law and Procedure), Sovetskoe gosudarstvo i pravo, 1956, No. 4, p. 36; M.S. Strogovich, Kurs sovetskogo ugolovnogo protsessa, 173; S.V. Kurylev, *loc. cit.;* I. Malkhazov, "Ponyatie materialnoi istiny v sovetskom ugolovnom protsesse," (Concept of Material Truth in Soviet Criminal Procedure), S.Z., 1952, No. 2, p. 13; A.A. Starchenko, *op. cit.*

For a critique of Strogovich's viewpoint see P.F. Pashkevich, "O poznanii istiny v sudebnoi deyatelnosti," (On the Knowability of Truth in Court Activity), Voprosy filosofii, 1957, No. 1, pp. 203–207.

[46] N.N. Polyanskii, *op. cit.,* pp. 117–118; *idem, op. cit.,* (note 44), 156–157. This

Similar differences in emphasis and priority condition the divergent approaches apparent among Soviet jurists to the problem of the ultimate criterion of truth in judicial work. The majority, proceeding from the premise of the absolute primacy of the material world and its determinant effect on human behavior, regard practice, understood as the impact of conscious conduct on, and its filtration through the prism of, the physical environment as the only dependable, indeed the only acceptable, measure of the veracity of man's mental and sensory perception.[47] As opposed to this, a considerable minority, strongly aware of the creative contribution of human thought to the process of accurate knowledge, endorse the "inner conviction of the judges" as the main gauge of truth in the everyday functioning of the courts. Indeed, they claim that "only truth of which the judges are convinced can be recognized as material truth in criminal cases, since there are no formal external characteristics which would permit a conclusion that this or that circumstance of the case is true independently of the judges being persuaded of its truth,"[48] even if the logical corollary of such an interpretation might be the unavoidable acceptance of the companion proposition that judicial activity encompasses "an intimate sphere which cannot be subjected to analysis and verification."[49]

Because the latter thesis is suspiciously reminiscent of the very un-Marxist doctrine of "judicial subjectivism," and, indeed, has upon oc-

point of view is criticized by M.S. Strogovich, *op. cit.,* (note 37), 173, fn. 1; Yu.K. Osipov, *op. cit.,* 121, fn. 6.

[47] P. Fedoseev, "Znachenie marksistsko-leninskoi teorii poznaniya dlya obshchestvennykh nauk," (The Significance of the Marxist-Leninist Theory of Knowledge for Social Sciences), Kommunist, 1955, No. 8, p. 34; A.I. Trusov, *op. cit.,* 91–113; A. Piontkovskii, *op. cit.,* 41–42; S.A. Golunskii, "Ob otsenke dokazatelstv v sovetskom ugolovnom protsesse," (On the Assessment of Evidence in Soviet Criminal Procedure), Sovetskoe gosudarstvo i pravo, 1955, No. 7, pp. 70–73; E. F. Kutsova, Sovetskaya kassatsiya kak garantiya zakonnosti v pravosudii, (Soviet Cassation as a Guarantee of Legality in Court Work), (Moscow, 1957) 105; A.A. Piontkovskii and V.M. Chkhikvadze, *op. cit.;* A.A. Starchenko, *op. cit.* (note 1).

[48] M.S. Strogovich, *op. cit.* (note 15), 115; M.S. Cheltsov, *op. cit.,* (note 44), 138–140; *idem,* Ugolovnyi protsess, (Criminal Procedure), (Moscow, 1948) 253; A.Ya. Vyshinskii, Kurs ugolovnogo protsessa, (Course of Criminal Procedure), (Moscow, 1927) 103; M.M. Grodzinskii, "O sposobakh polucheniya dokazatelstv v sovetskom ugolovnom protsesse," (On the Means of Obtaining Evidence in Soviet Criminal Procedure), Sovetskaya yustitsiya, 1958, No. 6, p. 11; *idem,* Kassatsionnoe i nadzornoe proizvodstvo v sovetskom ugolovnom protsesse, (Cassation and Supervision Functions in Soviet Criminal Procedure), (Moscow, 1953) 169.

In Sotsialisticheskaya zakonnost, 1954, No. 6, p. 9, a case is reported in which the people's court of the 1st precinct of the Yampolskii district of the Suma region ruled: "Although the witnesses do not furnish evidence against Mishkin concerning commission of the crime by him, the court is nevertheless certain that the killing of the cashier is Mishkin's doing."

[49] A.Ya. Vyshinskii, "Problema otsenki dokazatelstv v sovetskom ugolovnom protsesse," (The Question of the Assessment of Evidence in Soviet Criminal Procedure), S.Z., 1936, No. 7, p. 31. M.S. Strogovich, who first repeated Vyshinskii's views on this matter has since gone over to the opposition and in his 1958 work proclaims practice the sole criterion of truth (180–181).

casion been denounced as such in Soviet legal literature,[50] the proponents of this viewpoint go to considerable lengths to protect themselves from charges of contamination with "personal idealism" and to differentiate their position from such aberration. In the first place, they insist that, as they understand it, "judicial conviction in Soviet criminal procedure is devoid of all irrationalism": "it is not an unaccountable feeling, not an instinct, not an intuition, not a 'sensation,' not an 'inner voice,' but a conscious certainty in the correctness of the given decision on the guilt or innocence of the accused, a certainty grounded on objective considerations, from which follows precisely that decision and only that particular one and no other."[51]

In the second place, according to the defenders of this theory, the "inner conviction" to which they subscribe represents not the personal sentiments of the individual judge, his own prejudices, predilections, and ideals, but only those which possess the quality of "Party-ness": as is claimed, "the uniqueness of Communist Party-ness resides precisely in that it finds itself at one with objective truth, in that both subjectivism and bourgeois objectivism are quite foreign to it." Consequently, even for this faction, to be genuine and accurate the intellectual belief of a judge weighing the evidence in a case must have its source in and conform in every way to the *Weltanschauung* of the ruling ideology. Only thus is the desired situation achieved: "Communist Party-ness in the activity of Soviet judges expresses itself in a fervent struggle for truth in every judicial case and in the defense of the interests of the Soviet state, its legal order and legality on the basis of the known objective truth."[52]

Assuming, then, that the basic aspiration of Soviet criminal and civil procedure, as presently claimed, is the revelation of the incontestable truth of the disputed situation, how is this ideal goal to be achieved in actual life? Considering the importance attached to the question by Sovet jurists, it is surprising that the practical legal solutions suggested seem quite commonplace. In effect, most of the propositions which today are being so forcefully urged in Soviet legal circles as desirable, and indeed indispensable, elements of a genuinely socialist science of law, have long been accepted in the non-Communist world; ironically, many of these have until now been officially proscribed in the USSR as too "bourgeois."

[50] A.A. Starchenko, *op. cit.*, (note 1), 111–117; V.M. Chkhikvadze, Voprosy sotsialisticheskogo prava i zakonnosti v trudakh V.I. Lenina, (Questions of Socialist Law and Legality in the Works of V.I. Lenin), (Moscow, 1960) 292–293; V. Nikolaev, *op. cit.*, 50–53; P. Fedoseev, *op. cit.*, 34; A.A. Piontkovskii, "O nekotorykh voprosakh sovetskoi pravovoi nauki," (On Some Questions of Soviet Legal Science), Izvestiya, March 1, 1957; R. Rakhunov, "Sovetskoe pravosudie i ego rol v ukreplenii zakonnosti," (Soviet Justice and Its Role in the Strengthening of Legality), Kommunist, 1956, No. 7, p. 49; A.I. Trusov, *op. cit.*, 91–114.

[51] M.S. Strogovich, *op. cit.*, (note 17), 114–115.

[52] P.F. Pashkevich, *op. cit.*, 206; A. Piontkovskii, *op. cit.*, 42; I. Malkhazov, "Ponyatie materialnoi istiny v sovetskom ugolovnom protsesse," (Concept of Material Truth in Soviet Criminal Procedure), S.Z., 1952, No. 2, p. 13.

Thus, the most systematic study of the problem of the truth in Soviet criminal jurisprudence so far published in the Soviet Union singles out the presumption of innocence of the accused and the rule that the burden of proof rests exclusively with the prosecution as the most effective guarantees of accurate adjudication.[53] These two legal principles, while not without numerous critics in the Soviet legal profession even to this day,[54] have lately come to be regarded by a growing number of Soviet jurists as essential for proper functioning of the "socialist" judicial apparatus. Moreover, it is now generally conceded that one of the best ways to secure true judicial decisions is the conduct of a trial as a contest between adversary parties, granting the prosecution and defense exactly equal rights, restricting defense counsel to safeguarding the interests of the accused (and no longer, as heretofore, demanding that it function as an auxiliary of the tribunal) and postulating a process "at the basis of which lies collision and careful, exhaustive investigation of the opposing viewpoints—'for' and 'against.'"[55]

Among other things, the lack of all formal restrictions on Soviet judges with respect to the kinds of evidence which are acceptable is also normally considered as an improvement over other legal systems, and as an assurance of the possibility of free and untrammelled judicial pursuit of the ultimate truth unimpeded by artificial procedural limitations.[56] Finally, in line with the ideological program initiated at the 20th Party Congress,[57] large-scale participation of laymen in judicial work as people's assessors, public defenders, and prosecutors, etc., is currently being hailed as a practical means designed to guarantee disclosure of the real truth in the Soviet administration of justice. Indeed, such popu-

[53] M.S. Strogovich, *op. cit.* (note 15), 227–273; *idem, op. cit.,* (note 17), 183–227.

[54] *Cf.* P.F. Pashkevich, *op. cit.,* 203. In his two works on criminal procedure published respectively in 1948 and 1951, for instance, M.A. Cheltsov opposed the inclusion of presumption of innocence as a principle of Soviet law. For some reservations on the burden of proof rule, see N.N. Polyanskii, *op. cit.,* (note 44), 92–95.

[55] P.S. Elkind, "K voprosu o prave obvinyaemogo na zashchitu," (On the Question of the Defendant's Right to Counsel), Voprosy ugolovnogo prava i protsessa (Questions of Criminal Law and Procedure), (Uchenye zapiski L.G.U., No. 202, Leningrad, 1956), 251; A.L. Tsypkin, Pravo na zashchitu v sovetskom ugolovnom protsesse, (Right to Counsel in Soviet Criminal Procedure), (Saratov, 1959) 72–95. *Per contra,* see the articles by L.N. Gusev, M.A. Cheltsov and T.V. Malkevich in the anthology Voprosy sovetskogo ugolovnogo protsessa, (Questions of Soviet Criminal Procedure), (Uchenye zapiski Vsesoyuznogo yuridicheskogo zaochnogo instituta, Moscow, 1958), Vol. 6.

The "adversary" character of the Soviet judicial process has been recognized and reenforced by the 1958 basic principles of criminal procedure. See, A.F. Gorkin, "Sovetskii sud i dalneishee ukreplenie sotsialisticheskoi zakonnosti," (The Soviet Court and the Further Consolidation of Socialist Legality), Sovetskoe gosudarstvo i pravo, 1959, No. 2, p. 30, and S.A. Golunskii, "Novye Osnovy ugolovnogo sudoproizvodstva Soyuza SSR i soyuznykh respublik," (The New Bases of Criminal Procedure of the USSR and Soviet Republics), *ibid.,* 1959, No. 2, p. 51.

[56] M.S. Strogovich, *op. cit.,* (note 15), 52–57.

[57] For the impact of the revelations of the 20th Party Congress on Soviet law, see the author's "'Socialist Legality' in the U.S.S.R. Since the XXth Party Congress," American Journal of Comparative Law (1957) 546–559.

lar participation is said to counteract the often overly technical bias of the professional cadres, to infuse judicial proceedings with the grassroots wisdom of the working classes, the sole fountainhead of all progressive historical verities, according to Marx, and to allow common humanitarian feelings and sentiments of justice to attenuate the impersonality of the policies of the judicial machinery.[58]

## Conclusions

All Soviet philosophers and jurists now agree that the mainspring of Soviet legal procedure, civil as well as criminal, is the quest for objective truth.[59] This line of thought has been particularly manifest since the revelations of the 20th Party Congress and the resulting campaign for the "strengthening of socialist legality" in the operations of all organs of the administrative structure, a campaign, incidentally, which continues unabated to this very day.[60] As part of the wholesale process of reappraisal of Soviet law and the performance of Soviet courts in the past forty years, a thorough re-examination of the philosophico-juridical significance of the concept of truth for the activities of the Soviet judiciary has been undertaken. Though conducted largely on a remote theoretical plane, the discussion, nevertheless, is intimately linked with existing pressures within the USSR for effective "socialist" justice and for the final liquidation of past abuses allegedly fostered by the discredited "cult of the personality." At the same time, it provides a vehicle for the still unsatisfied aspirations for further reform in Russian legal and intellectual circles today, indicating some of the sources of continuing friction and frustration among the articulate elements of Soviet society in the relations between the individual and the State.

In any attempt to place the present ideological debate in its proper perspective, one must bear in mind the special position occupied by the Soviet legal profession within the official hierarchy, which is quite different from that of its counterparts in the "bourgeois" world. In the USSR, prominent lawyers and law professors are either directly employed in the public service in various consultative and "specialist" capacities or are closely affiliated with responsible government offices. A widespread debate involving the very fundamentals of Soviet legal dogma, such as the present airing of opinions, cannot but have some impact on administrative policy and, in fact, would probably not have been initiated in the first place unless there were some hope among the participants that the prospects were favorable to convert the powers-that-be to the

[58] E.g., A.I. Trusov, *op. cit.*, 125–144.

[59] M.S. Strogovich, Osnovnye voprosy sovetskoi sotsialisticheskoi zakonnosti, (Fundamental Questions of Soviet Socialist Legality), (Moscow, 1959) 59–61.

[60] For the effects of the new "socialist legality" emphasis in Soviet jurisprudence on the work of the Procuracy, see the author's "The Soviet Procuracy and Forty Years of Socialist Legality," American Slavic and East European Review, 1959, No. 1, pp. 34–62.

views advocated. Current discussion, therefore, must be viewed as a purposeful development in doctrinal polemics, perhaps not in every minute detail, but certainly in its over-all conception, the objective being to secure the support of the existing regime for reforms desired by the more "progressive" faction of the legal profession.[61]

Precisely because of the purpose and intent of the whole discussion, has it assumed its present shape. The choice of abstruse and esoteric formulations in voicing the problem can scarcely be ascribed to chance, but seems premeditated for a number of reasons. If the undeclared motive for the debate has been to influence the regime, the choice of means for achieving this end of necessity had to be circumspect. It should be remembered that a prominent group of Soviet jurists had been agitating for some of the changes, still unfulfilled to this day, ever since the death of Stalin and the onset of the "thaw," only to witness the rebuff of some of their more urgent proposals by the politically minded legislators in 1958 in connection with the promulgation of the basic federal principles of criminal law, penal procedure, and judicial organization. Among these, the presumption of the innocence of the accused was the most crucial issue rejected, but this was by no means the only one; a number of other procedural guarantees endorsed by the legal profession to protect the individual were also eliminated. Consequently, the position of those who persist in advocating such reforms remains precarious even under the new order, and for the time being too obvious an attack on administrative policies would be manifestly inopportune.

This situation, it would seem, explains the highly theoretical tenor of the present discussion, which is but a fragment, albeit clearly significant, of the general soul-searching that is occurring in various quarters among the Soviet legal elite. In the first place, there is a long-established tradition in the USSR in favor of such an approach. A mere glance at Soviet legal literature will reveal that since the early days of Stalinism all proposals of change, however routine, always appeared in the disguise of speculative exercises in legal theory as orthodox glosses on some classic text of Marxism-Leninism-Stalinism. This practice has developed into an ingrained habit. Rarely does one find Soviet lawyers addressing themselves directly to the problem of devising institutional controls or practical guarantees to prevent or remedy abuses of the law. Instead,

[61] The receptiveness of the present regime to persistent criticism at large is indicated by the success of some such drives to obtain concessions on unpopular points of administration and law. For instance, a broad interpretation of *reformatio in pejus* principles working against the interests of the accused through a Resolution of the Plenum of the Supreme Court of the USSR was set aside in another Resolution of that body admittedly because of the widespread criticism it provoked in legal circles. See, L.N. Smirnov (Vice-Chairman of the Supreme Court of the USSR), "O resheniyakh Plenuma Verkhovnogo Suda SSSR po nekotorym voprosam ugolovnogo prava i protsessa," (Concerning the Decisions of the Plenum of the Supreme Court of the USSR on Some Questions of Criminal Law and Procedure), Byulleten Verkhovnogo Suda SSSR, 1957, No. 2, pp. 38–39.

aspirations for improvements, and suggestions on how they may be achieved, customarily are couched as demands for reappraisal of the doctrinal connotations of some abstract principle, even when it was clear that such ideological reformulation would give the rule an entirely new content and lead to definite practical transformations in the administration of justice.

Even the momentous revisions introduced on the Soviet scene by the de-Stalinization drive begun at the 20th Party Congress, despite the gravity of excesses then first made public, did not result in any particularly striking institutional reforms. Not a *de facto* and abrupt refashioning of the visible letter and fabric of the provisions of the law, then, but subtle reinterpretation and remolding of the inner meaning of the normative prescriptions seems to be the method preferred both by the regime and its legal advisers to ameliorate the quality of Soviet jurisprudence. The official justification offered is that practical alterations will be little more than formal subterfuges which must remain meaningless in the long run, if the ideological milieu is not at the same time revitalized. Hence, creative dogma is deemed more fruitful to promote progress, in law as in every other field of human endeavor, than mere manipulation of institutional devices.

There is no doubt, of course, that official approval of the main points of the legal program under discussion in Soviet jurisprudential literature today would have immediate and far-reaching repercussions on the whole legal system of the USSR and indeed the entire physiognomy of Soviet legal science. True, the doctrinal principles elaborated in the course of the debate are ostensibly advanced in order to assure realization of a Marxist-Leninist ideological imperative in the sphere of epistemology applied to legal activity. However, if endorsed in good faith by the regime and incorporated into the reigning ethico-cultural *Grundnorm* which conditions the socio-political consciousness of the judiciary, dictating the functional value–system conditioning their behavior, these propositions would undoubtedly revolutionize overnight the spirit of Soviet law. It appears certain that the ultimate objective of those with whom the current debate originated is to accomplish precisely such a metamorphosis through a highly esoteric reorientation of Russian jurisprudential thought. An undertaking of this sort could not possibly offend the regime by its directness, yet would constitute the first step, and the most crucial one, in a process of impregnating existent Soviet legal formulas with an entirely renovated meaning, introducing a fundamental and decisive change without the appearance of an open, and perhaps politically embarrassing, break with precedent.

While such is unquestionably the chief purpose of the present polemics, the exact aim of some of the individual proposals and speculations is at times difficult to establish with certainty because of the very

way in which the discussion has been developing. For instance, defense of the thesis that the only criterion of truth in judicial proceedings is the *bona fide* inner conviction of the judge concerning the sufficiency of the evidence submitted and the guilt or innocence of the accused, an intimate sphere of personal belief which does not lend itself to verification through external measurement, indicates a definite bias with regard to what is considered a desirable *modus operandi* in the field of law. First, it implies that any interference, however well intended, either by the bureaucracy or the Party, with the process of crystallization of the judge's mental attitude vis-à-vis the facts of the case, cannot guide or substitute for the only real standard, namely, an independently arrived at subjective persuasion. Second, from this it is tacitly inferred that administrative intervention in judicial deliberations is basically contrary to the best interests of true justice. The implications of such a thesis for the claim of the Party's leading role in all fields of social organization are self-evident. It represents nothing less than an appeal, in disguised form, for genuine independence of the judiciary from pervasive political control.

On the other hand, it does not automatically follow that the various criticisms directed at the above interpretation necessarily arise from an inclination in certain quarters to favor Party or executive dictation in judicial affairs. They may indicate sincere disagreement on purely doctrinal grounds or even a difference of opinion inspired by practical considerations, since it is conceivable that general acceptance of such subjective criteria in the discharge of judicial duties, given a deterioration in the political atmosphere, could easily result in open abuse of the law and judicial excesses logically justified by reference to the (Party-inspired) inner conviction of the judges in complete disregard of formal due process—an effect diametrically opposed to what is envisaged. Thus, the outwardly conflicting positions of the contending factions may well cover basic concurrence on the central issue. That this is not apparent is due to the prevailing disagreement on the methods of achieving the common end.

It is doubtful that any other comparable group of learned individuals is as well equipped by experience as the Soviet legal profession to recognize that formal guarantees, whether in the shape of institutions or written codes, are of no avail when the proper spirit of the law is lacking. It is precisely against this background that one must examine and evaluate the present emphasis by its spokesmen on the regeneration, not of the letter of positive law, and even less of its institutional framework, but of the very socio-ethical atmosphere and ideological fabric and pattern of Soviet jurisprudence. They seem to be well aware, to judge only by their writings on the nature of truth in the judicial process, that given the right spirit, substantive justice will inevitably follow, whereas

in its absence the prospects are almost nil. The inculcation of a mode of legal thinking in which the general assumption prevails that in the work of the courts only truth, total truth beyond the shadow of reasonable doubt, alone warrants judgment, would effectively lay the groundwork for the beginning of such spiritual "rearmament" and the eventual development of a rule of "socialist legality" providing real assurance of the protection of the rights of the individual vis-à-vis the community. At the same time, it would banish once and for all the memory of past practices redolent with sentences based on insufficiently proven suspicions, convictions obtained through casuistic arguments anent possibility and probability, and other gross violations of due process and elementary justice.

SALAH-ELDIN ABDEL-WAHAB AND JOHN H. BRINSLEY

# The Stipulation for a Third Person in Egyptian Law

## I. Historical Résumé

In the "stipulation of another," as it is known in civil law terminology, the most important role is that of the promisee who stipulates for the benefit of a third person. The concept of this transaction, in which the contracting parties contemplate that their agreement should benefit a third person whom they have designated, assumes that neither party has a mandate to stipulate in the name of the third person; therefore, it excludes contracts made in the name of another by a representative, such as a tutor or a mandatory; it is a contract made in favor of a third person. The purpose of the present article is to examine the conditions of this form of contract in favor of third party beneficiaries, its nature and effects, as adopted in the Egyptian Civil Code.

The background of the detailed treatment of the stipulation for another person in the Egyptian Civil Code includes first of all the Roman Law, then the ancient French jurisprudence, and subsequently, the French Civil Code of Napoleon of 1804, which was followed in the old Egyptian Civil Code of 1883. A general survey of the historical sources of Egyptian law regarding stipulations for another, therefore, should refer to the Roman and French developments, and in addition to the German theory of third person beneficiaries to see to what extent the present Egyptian Civil Code has been influenced by this theory.

1. *The Roman rule.* The classical rule in Roman law was that a contract made by one person could not confer an action upon a stranger to the contract. (*Nemo alteri stipulari potest.*)[1] This rule applied not only to stipulations but to other contracts and pacts as well. Consequently, stipulations for another person were held invalid whether as regards the relation between the promisor and the promisee,[2] or the relation between the promisor and the beneficiary, as the latter was not a party to the contract (theory of privity of contract).

The rigidity of this rule and the inelasticity of its adaptation to social and economic changes was felt by certain jurisconsults to make its modi-

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[1] Al-Sanhoury, 2 Treatise on the Egyptian theory of obligations (1952) 566.

[2] The latter cannot require performance, as he did not stipulate for his own benefit. Williston, "Contracts for the Benefit of a Third Person in the Civil Law," 16 Harv. L. Rev. (1902) 43.

fication necessary, and in their opinions its scope was materially reduced. In some cases, a simple palliative was employed, leaving the principle subsisting: such was the practice of the *adjectus solutionis gratia,* the mention in the stipulation of the third party, who was authorized to receive payment, without thereby acquiring the right to exercise the action arising from the contract. In other cases, the direct right of the third person to sue on the contract was recognized but by way of exception. Two exceptions of this kind were admitted, one for donations under condition (*donationes sub modo*), the other for restitution of dowry. In these cases, the third party designated as beneficiary of the *"modus,"* or as the person appointed to receive the dowry in default of the grantor, had the right to bring action. However, the action made available (*actio utilis*) was of an equitable nature; a fiction was used conserving the ancient restriction but at the same time avoiding its application in these cases in which justice or convenience seemed to require amendment of the basic rule. Eventually however, this distinction between the *actio utilis* and the direct action disappeared.

It has been said that two other contracts, deposit and mortgage,[3] also were recognized as allowing stipulations for third parties. Theoretically, this modification was introduced on the basis of a *presumed penalty.*

Another method by which modifications were made in the rule invalidating stipulations for another person, involved the *theory of interest.* Under this theory, such a stipulation will not be void where the stipulator has a personal interest, whether material or moral, in the performance of the stipulation. This theory of interest will be discussed further in connection with the relation between the promisor and the promisee (*stipulator*) in Egyptian law.

2. *Ancient French jurisprudence.* In spite of these modifications in the old Roman rule, it remained impossible in principle for a third party to bring an action arising on a contract for his benefit. In French law the principle was maintained, but the area of exceptions to the rule was singularly enlarged. Pothier, while recognizing and justifying the maxim *alteri stipulari nemo potest,* favored the validity and efficacy of contracts for the benefit of third parties: on the one hand, in all cases where the contract is accessory to the alienation of a thing; on the other, in all cases where the promisee has a personal interest which can be evaluated in money at the time of performance. In fact, in the latter case, there is no right of action in favor of the beneficiary, but the promisee can compel the promisor to perform.[4]

[3] Al-Sanhoury, *ibid.,* p. 567.

[4] Oeuvres de Pothier, annotées et mises en corrélation avec le code civil et la législation actuelle par M. Bugnet. Tome 2, Traité des Obligations, 1re partie, Chap. 1er Sect. 1re, Art. V, Sect. 54:

> "Lorsque j'ai stipulé quelque chose de vous pour un tiers, la convention est nulle; car vous ne contractez par cette convention aucune obligation ni envers ce tiers,

3. *Solutions of the French Civil Code.* Observing the literal meaning of the words used in Articles 1119–1121, it may safely be stated that the drafters of the Civil Code of 1804 intended to adopt the solutions given by Pothier. Loyal to tradition and faithful to the Roman texts, they began by stating the classic prohibition of third person beneficiary contracts in Article 1119:

*"On ne peut, en général, s'engager, ni stipuler en son propre nom, que pour soi-même."*

Then in Article 1121, the exceptions to the rule are indicated:

*"On peut pareillement stipuler au profit d'un tiers, lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut la révoquer, si le tiers a déclaré vouloir en profiter."*

Accordingly, third party stipulations are valid only in two cases: i.e., when such a stipulation is the condition:

(1) of a donation made by the stipulator to the promisor; this is the classic hypothesis of the *donatio sub modo* (donation under condition);

(2) of another stipulation which the stipulator has made at the same time for himself; this is the hypothesis of third party beneficiaries in the proper sense.

The classical jurists ordinarily interpreted this last formula in a narrow sense, limiting it to the case in which the promisee has stipulated for himself and a third person at the same time, i.e., where two beneficiaries are involved, one of whom is the promisee, as where the vendor stipulates in the contract that the vendee will pay half the price to him and the other half to a third person, or is to pay the full price to the vendor's creditor.

Such literal interpretation would have restricted the area of application of this exception, but fortunately the scope of Article 1121 was determined by the courts.[5] In fact, the Article has been subject to a

ni envers moi. Il est évident que vous n'en contractez aucune envers ce tiers: car c'est un principe, 'que les conventions ne peuvent avoir d'effet qu'entre les parties contractantes', et qu'elles ne peuvent par conséquent acquérir aucun droit à un tiers qui n'y était pas partie, comme nous le verrons ci-après. Vous ne contractez non plus par cette convention aucune obligation civile envers moi; car ce que j'ai stipulé de vous pour ce tiers, étant quelque chose à quoi je n'ai aucun intérêt qui puisse être appréciable à prix d'argent, il ne peut résulter aucuns dommages et intérêts envers moi du manquement de votre promesse: vous y pouvez donc manquer impunément. Or rien n'est plus contradictoire avec l'obligation civile, que le pouvoir d'y contrevenir impunément; c'est ce que veut dire Ulpien, lorsqu'il dit: Alteri stipulari nemo potest; inventae sunt enim obligationes ad hoc, ut unusquisque sibi acquirat quod suâ interest; caeterùm ut alii detur, nihil interest meâ. L. 38 § 17, ff. de Verb. obl."

[5] Colin, Capitant and Julliot de la Morandière, *ibid.*, 544—See Encyclopédie Dalloz, 5 Droit civil, 50 and Smith, J. Denson, "Third person beneficiaries in Louisiana," 11 Tulane L. Rev. (1936) 18.

permanent evolution in order to meet everchanging practical needs, notably as applied to insurance policies. The word "stipulation" in Article 1121 has been interpreted liberally to mean mere "contracting."[6] According to the more recent interpretation, it is sufficient for the promisee to act in his own name in the contract, in which case it is immaterial to the validity of his stipulation for a third person whether or not he also stipulates for himself. Only two conditions are important to render the stipulation for a third person effective:

(1) That the promisee in his own name stipulates a right for himself or binds himself. An insurance policy made by an employer for the benefit of his employees, usually does not include any stipulation for his own benefit, while he is bound to pay the premiums to the insurance company.

(2) That the promisee must have a personal interest serving as a motive to stipulate for the benefit of a third person.

However, in the later phase, the first condition was left out, leaving as the only condition to validate stipulations for the benefit of third parties, the existence of a *personal interest* in the promisee.

4. *The 19th century German theory of third person beneficiaries.*[7] The starting point in this theory is a critical analysis of the old Roman rule of the invalidity of stipulations for the benefit of a third person. To overcome this obstacle, the advocates of the new theory argued that the old Roman rule was justified in its time as a principle consonant with the formalism that served as the basis of Roman law, but should give way in legal systems which have been liberated from such emphasis on form and in which the rules of contract law are based on the principle of autonomy of the will.[8] Moreover, it was noted, the Romans themselves had deviated from the rule in Justinian's time. It was further pointed out that the theory of relativity of contract was not accepted in the old Germanic laws and as a result was not usually applied in the Holy Roman Empire nor in the German states which succeeded on the downfall of the Empire. As a last ground, they asserted that the prohibition of third person beneficiaries no longer accords with the existing progressive commercial spirit and march of society, for which insurance has been found helpful. Therefore, as an inevitable consequence, the old rule should be set aside, and stipulations for the benefit of third parties recognized as a separate and distinct contract by itself. However, the partisans of this theory were never in agreement either on the scope of

[6] This tendency coincides with the new theory of third person beneficiaries of German origin.

[7] In connection with this part, we are especially dependent on Dr. Sami Madkour's paper published in 23 Law and Economics Review of Cairo University Law School, vols. 1 and 2 (1953) 175.

[8] However, this is not quite true, as the theory of relativity of contract is justified by the fact that a contractual obligation is a personal relation between the parties (theory of privity in American law).

this contract, or its effects. Thus, the German jurists disputed the elements of stipulations for another as respects the parties, the cause, the object, and the effects of such stipulations.

a. *The parties.* A stipulation for a third person presupposes the existence of three parties: the promisee (stipulator), promisor, and beneficiary. The relation between the promisee and the beneficiary differs according to the circumstances. The intention of the stipulator may be the performance of an existing obligation (*solvendi causa*), or to assume an obligation prior to that of the beneficiary (*credendi causa*), or to make a gift (*donandi causa*). This relation would involve no difficulties whether we look at the cause subjectively, as the inducible motive for contracting, or objectively, as the legal justification of the ensuing enrichment. At any rate, it is a relation which falls outside the scope of the stipulation. For this reason the majority of the German jurists concern themselves with the relations between the stipulator and the promisor, and that between the beneficiary and the promisor.

b. *The cause.* Some jurists assert that no contract is formed by stipulation, unless the stipulator binds himself to do an act or to forbear from an act for the promisor who in return promises the benefit to be conferred on the beneficiary. This is an objective view of the cause as the mere legal justification of the enrichment that occurs. In this view, the stipulation is based upon the idea of enrichment; the promisor, having received a cause for his obligation from the stipulator, binds himself to fulfill his promise to the beneficiary so that there may be no unjust enrichment. This view apparently narrows the scope of stipulation contracts for another within the limits known in the Roman law.

Other jurists hold that the stipulation contract is formed as soon as the parties agree. This view extends the concept according to the individualistic notion of the principle of the autonomy of the will. The cause is a mere intrinsic element of the obligor's will and not a distinct and separate object. This difference between the two views of the cause of the promisor's obligation affects the determination of the nature of the stipulation. According to the first view, the stipulation is based on the interdependence of two obligations: the stipulator's obligation toward the promisor and the latter's obligation toward the beneficiary. Hence, it is always a contract of onerous nature as to the promisor.

c. *Object of the stipulation.* The object of the stipulation also has been a field of conflict among German jurists. To some, the stipulation is invalid unless the parties intended to give the beneficiary a right which is not already his. Others do not insist on this condition, and validate the stipulation when the parties intended to grant the beneficiary any benefit, even if only the right to an action for the protection of an existing right. To some the object of the stipulation has to be a pure and liquidated right, while others object to such restriction and

admit stipulations in which the parties qualify the right to be conferred upon the beneficiary by attaching obligations which may be equivalent in value to the right stipulated.

d. *The effects of the stipulation.* The conflict in respect of the cause and object of the stipulation also extends to its effects, assuming it to be validly formed. The jurists agree that the beneficiary's right exists "between the parties" from the date the stipulation is formed, but they differ as to other effects.

*The beneficiary's right.* Some jurists hold that the beneficiary's right forms part of his patrimony as soon as the contract is formed. Others object that this leads to an abnormal result, namely, that rights exist in a person's patrimony without his knowledge or against his will (*invito beneficium non datur*). Therefore, for these jurists, the right of the beneficiary exists only when both or either of the parties notify him of the existence of the stipulation. Another theory, deeming notice insufficient, regards a voluntary act on the part of the beneficiary as necessary. However, the partisans of this theory are not in accord in regard to the nature of the required voluntary act, whether ratification or acceptance.

Some jurists have urged that the right created is irrevocable, the parties neither both nor either having the power to revoke it even when the beneficiary is without knowledge or ratifies after receiving notice. Others assert that the right initially is revocable between the parties and is not vested unless it becomes part of the beneficiary's patrimony. From this view, it follows that the parties together or the stipulator alone, depending on the circumstances, can revoke the stipulation before it enters the beneficiary's patrimony by notification, ratification, acceptance, or intervention in the contract (according to the particular theory).

*The nature of the right.* Certain jurists said that the right of the beneficiary is merely the stipulator's right which is transmitted to the beneficiary. This transmittance may be based on a *simulated assignment* or on a *mandate to receive it* (*mandatum ad agendum*). Others regard the beneficiary's right as a distinct personal right that he acquires directly from the contract and not from the stipulator. However, this theory does not prevail in German doctrine, which in general bases the beneficiary's right to enforce the promisor's obligation on the promisor's unilateral jural act or on quasi contract.

## II. Egyptian Law

1. *The Code provisions.* The old Egyptian Civil Code had but one provision concerning stipulations for another person. Article 137 thereof stated merely that any person had the right to accept or reject his appointment as a beneficiary without mandate.[9]

[9] The old Egyptian Civil Code was thus ambiguous about the validity of stipulations

The present Egyptian Civil Code is broader in scope. It contains three articles, made effective in October of 1949, applicable to third party contracts. Article 154 provides in substance (a) that a person may stipulate in his own name for the benefit of a third party if he has a valid materialistic or moral reason for so doing; (b) that the third party thereafter has a cause of action against the promisor subject to any of the defenses under the contract which the promisor could invoke against the stipulator, unless the third party contract expressly negates such right; and (c) that the stipulator may specifically compel the promisor's performance unless the contract expressly indicates that only the beneficiary shall have this right. Article 155 provides in substance that (a) unless the contract provides otherwise the stipulator may revoke his stipulation up to the time that the beneficiary notifies the promisor of his assent; and (b) that such a revocation does not discharge the promisor unless the stipulator so agrees—the stipulator may substitute a new beneficiary in place of the first or enforce the promise for his own benefit. Article 156 provides in substance that if the beneficiary is determinable at the moment when the contract for his benefit becomes effective, he may be undetermined or even nonexistent at the time the contract is made.

2. *The elements of a valid third party stipulation.* Other than the usual requirements of contract validity,[10] there are three conditions precedent to the validity of a third party stipulation under Egyptian law:

(1) *The stipulator must act in his own name and not as a representative of the beneficiary.* This element distinguishes the stipulator from the agent, who acts on behalf of his principal to bind him contractually. The stipulator binds only himself—not the beneficiary.[11]

(2) *The stipulation must confer a direct benefit upon the beneficiary.* No third party rights are created where the promisee stipulates for a personal right which brings incidental benefit to a third party. Thus a liability insurance policy cannot be characterized as a third party stipulation, although the insurance company indemnifies the injured third person. The insured therein stipulated for his own benefit—to provide against a possible crippling liability in damages.[12] Nor are third party rights created by the promisee's assignment or bequest to a third person.

for third persons. Classical Islamic law upheld only those stipulations which were made for the benefit of creditor beneficiaries. See in general, Al-Sanhoury, Sources of Rights in Moslem Jurisprudence (1958) 195; Shafik Shehata, The General Theory of Obligations in Moslem Law, Thesis, University of Cairo, No. 189 (1936).

[10] See part 4 below.

[11] That is why the theory of the management of affairs (*gestion d'affaires*) could not justify the third party contract in the French courts. Also, the power of the managing agent (*gérant*) to bind his principal irrevocably was contrary to Article 1121 of the French Civil Code which permitted the promisor and stipulator to rescind their contract before the beneficiary had given notice of his assent.

[12] Al-Sanhoury, *ibid.*, 575.

Since the beneficiary of a valid stipulation receives his rights directly from the contract between the promisor and the stipulator, there is no need for him to contract anew with the promisor.[13]

(3) *The stipulator must have a personal interest in the stipulation.* Although this condition is akin to condition (1) above, it is different from it. In essence it requires the stipulator to have a valid reason, materialistic or at least moral, for obtaining benefit for the third party.[14] This ensures that the stipulator, like any other party, will have an interest worthy of judicial protection (*pas d'interêt, pas d'action*).

The late Professor Bahgat Badaowi, reasoning that a sane person always has some good reason for his acts, conclusively presumed the existence of a personal interest by the stipulator in all third party stipulations[15]—thus removing the personal interest element as a serious obstacle to enforcement thereof.

3. *The beneficiary of the stipulation.* Article 156, *supra,* requires only that the beneficiary be specifically ascertainable on the day that the agreement is to take effect, and explicitly allows the beneficiary to be future and undetermined at the time of stipulation. This progressive provision is a codification of French and Egyptian decisions which had upheld stipulations for undetermined persons or organizations in the following situations: (1) clauses protecting future employees of public works contracts;[16] (2) *inter vivos* creations of charitable foundations for the poor;[17] and (3) life insurance policies for the benefit of unnamed heirs.[18] Article 156 permits a father to make out his life insurance policy for the benefit of his unborn heirs.[19] It is certainly reasonable to allow two living parties to contract for an unborn third. The third party's

[13] The drafters' explanation to the Egyptian Civil Code shows that the Egyptian legislators intended to embody this rule in Article 154 (b) of the Egyptian Civil Code. Such a view would seem to be axiomatic. Yet the French Courts of old applied a different theory, principally in life insurance cases. Paris, April 5, 1867 (Dalloz 67.2.221, S. 67.2.249); Caen, March 14, 1876 (D. 79.2.131, S. 77.2.332); Cass., February 7, 1877 (D. 77.1.337, S. 77.1.393); Amiens, December 19, 1877 (D. 78.2.224, S.78.2.13). According to them, the stipulator "offered" to the third person the stipulation made for that person. This offer then had to be accepted before the promisor was bound to perform. The acceptance once made was retroactive to the original contract, and the third person then became the primary creditor of the promisor. This theory was severely criticized because of its unfortunate results and no longer represents the law of France. See the decisions of the French Court of Cassation rendered February 8, 1888 (D. 88.1.193, S. 88.1.121) and April 21, 1891 (S. 95.1.398). Accord, Al-Sanhoury, *ibid.,* 575.

[14] Al-Sanhoury, *ibid.* p. 576. See also, Al-Sanhoury, The Theory of Contract (1939) 899, and the late Professor Al-Khaiaal's Mimeographed Materials For Second Year Students of the University of Cairo Law School (1947–48).

[15] Badaowi, Origins of Obligations (1945) 342.

[16] Pothiers, June 20, 1889 (D. 90.2.159).

[17] Colin, Capitant and Julliot de la Morandière, Traité de Droit Civil (1959) 555.

[18] *Ibid.,* 555.

[19] Accord, French Civil Code Article 63, statute of July 13, 1930, which reversed the French Courts on this points. See Colin, Capitant and Julliot de la Morandière, *ibid.,* 556.

consent is unnecessary for contract formation, and his rights commence upon the day of his birth.

Moreover, it has long been the law of Egypt that every individual citizen obtains direct contractual rights against a public utility by reason of that utility's promise to supply water, gas, or electricity to a municipality in which the citizen resides.[20] Also, an owner (especially if a public body) may require the builder to pay those who will be employed on the job a certain minimum wage, to set maximum hours of work per day, and to obtain adequate insurance. Thus, the recognition of stipulations for the benefit of future third persons was a practical necessity.

4. *The juridical relationships arising from the stipulation.* The third party stipulation is a complex transaction which creates three distinct juridical relationships: (1) between the stipulator and promisor, (2) between the promisor and third person beneficiary and (3) between the stipulator and beneficiary.

(1) *The stipulator—promisor relationship.* The validity of this relationship depends upon general contract law, as well as the factors mentioned in Part 2 above. There must be mutuality of obligation, and the promisor, unless he makes his promise in notarial form,[21] must receive valid consideration in exchange for his promise. If the stipulation is valid, the stipulator may obtain specific performance of the promisor's obligations unless the contract expressly negates such right.

(2) *The promisor—beneficiary relationship.* The true third party beneficiary is never a party to the contract. The promise runs not to him, but to the stipulator. Hence the slow development of the beneficiary's rights and the profound theoretical arguments of the past in this area of Egyptian law. It is clear today in Egypt that the beneficiary acquires direct rights from the stipulation.

These rights are created outside the stipulator's patrimony and are unattachable by the stipulator's creditors either during his lifetime or in his estate after death. The proceeds of a life insurance contract (perhaps the most common of third party contracts), for example, go directly to the beneficiaries thereof, not under the law of inheritance, but outside the estate under the insurance contract.[22]

Under Article 154 (b), discussed above, the beneficiary has a direct cause of action against the defaulting promisor unless the third party contract expressly negates such right. (Very often where the government is the stipulator for the benefit of many of the people, the government will reserve for itself the sole right of enforcement.) The beneficiary is subject to any of the defenses which the promisor could have

[20] The former Mixed Court of Appeals, December 20, 1894, 7 Bulletin 46; January 25, 1923, 25 Bulletin 165. Compare Article 669 of the present Egyptian Civil Code.

[21] Pursuant to Egyptian Civil Code, Article 490.

[22] Tanta Court of General Jurisdiction, April 23, 1931 (12 Al-Mohamah—1940).

raised against the stipulator. These include the promisor's personal incapacity, mistake or duress (but strangely not the fraud of the stipulator, unless the beneficiary was a party thereto), failure of consideration, or a breach of contract by the stipulator.

Since the source of the beneficiary's rights is the contract, those rights are created when the contract is formed,[23] and not from the time the beneficiary notifies the promisor of his assent to the stipulation.

(3) *The stipulator—beneficiary relationship.* This relationship is the least important of the three: Egyptian law recognizes the difference between the donee and the creditor beneficiary, dependent upon whether the stipulator intended to confer a gift or extinguish an obligation. Since the donation is indirect, the stipulator need not use the notarial form.[24]

5. *Revocation of the stipulation.* Article 155 of the Egyptian Civil Code permits the stipulator, unless the contract provides otherwise, to revoke his stipulation up until the time that the beneficiary notifies the promisor of his assent. This limited right of revocation is personal to the stipulator. It cannot be exercised by the stipulator's creditors or heirs nor, with one exception, *by the promisor.* The exception, grafted upon Article 155 by the courts, permits the promisor to revoke after the stipulator changes the beneficiary, before the new beneficiary gives notification of his assent, where the contract expressly confers such right upon the promisor.[25] The revocation may take any reasonable form, implicit as well as explicit, and becomes effective only upon receipt by the other two parties. An effective revocation destroys all of the first-named beneficiary's rights in the third party stipulation. The stipulator may then name another beneficiary, including himself, in which case that beneficiary obtains his rights as of the time of contract formation.[26] In the unlikely event that no new beneficiary is named, the stipulator would be liable for breach of contract to a promisor ready, willing and able to perform.

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[23] The former Mixed Court of Appeals, January 18, 1917, 29 Bulletin 163. See also the decision of the French Court of Cassation, March 28, 1944 (D.C. 1944 J. 108), wherein the court stated:

> "The beneficiary is invested with the right stipulated for his benefit in an insurance policy as early as the moment of stipulation when, absent any revocation, the action for payment is acquired by him."

In the note written under this decision, it was stated:

> "The cause of action in favor of the named beneficiary of an insurance contract is derived exclusively from that contract. The situation of such a beneficiary thus differs from that of a victim of an accident whose cause of action against the wrongdoer is derived from law apart from any liability insurance carried by the wrongdoer . . . (Civ. 28 March 1939, D.P. 1939.1.68—26 March 1941, D.H. 1941. J. 195)."

[24] Compare footnote 21 *supra.*

[25] The former Mixed Court of Appeals, December 17, 1914, 27 Bulletin 71.

[26] Colin, Capitant and Julliot de la Morandière, *ibid.,* 553.

Once the beneficiary notifies the promisor of his ratification of the contract, his rights vest therein and neither of the original parties to the contract has the right to revoke. (Where there has been both a revocation and a ratification, the first party to notify the promisor prevails.) The beneficiary is thus given a chance to accept or reject the benefit being conferred upon him. If he does not give notification of his assent within a reasonable time after knowledge of the contract, he will be held to have rejected his rights.[27]

6. *Recent expansions of the third party concept.* Third party contract principles have been traditionally applied in Egypt to situations involving transfers of mortgaged property to an assuming grantee with the mortgagee's consent;[28] life insurance policies;[29] contracts betwen public utilities and municipalities;[30] and other familiar situations.

The French Court of Cassation has been expanding the use of the third party stipulation in recent years. In the case of *Centre Nationale de Transfusion Sanguine et C^ie d'Assurance c. Epoux L . . .*[31] decided on December 17, 1954, the Court held that a patient who had been injured while obtaining a transfusion from the defendant blood center was presumed to be the third party beneficiary of a contract between the center and the first aid station. In the case of *Société Transports Citroen d'Auvergne c. Dame Abelin et autres,*[32] decided on February 15, 1955, the Court held that the deceased victim of a railroad accident was presumed to have stipulated that his recoverable damages be paid to his surviving spouse. And in the case of *C^ie Air France c. Cons. Vizioz,*[33] decided on January 23, 1959, the Court indicated that the surviving spouse of a person killed in an airplane accident might have standing to sue the carrier for damages as a presumed third party beneficiary of the contract between the victim and the carrier.

It is reasonable to expect similar expansion of the third party concept in the Egyptian courts.

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[27] The determination of a reasonable period is within the discretion of the court. II Drafters' Explanation of the Civil Code 317.

[28] These contracts were enforced on a third party basis before the enactment of Articles 154–156 of the Egyptian Civil Code. See the former Mixed Court of Appeals, March 2, 1916, 18 Bulletin of Mixed Courts 184, January 18, 1919, 31 Bulletin 127, Court of Cassation (civil chamber), March 27, 1941, 3 Supreme Court Reporter (Mahmoud Omar) 337.

[29] Al-Sanhoury, *ibid.*, 571.

[30] See footnote 20, *supra.*

[31] D.J.1955.269.

[32] D.J.1955.519.

[33] D.J.1959.101.

# Comments

## THE NEW CANADIAN BILL OF RIGHTS

From the time of its first introduction by Prime Minister Diefenbaker in the House of Commons in Ottawa, on September 5, 1958, two years before its final enactment, Bill C-79, "An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms," has been a politically controversial measure. Like so much else in Canadian public law and political life, the new Canadian Bill of Rights represents an attempt to gloss over or compromise conflicting or opposing attitudes and opinions, but as a compromise, the Bill has not proved satisfactory to any of the main competing groups—whether to those who, in the best English legal tradition, oppose the whole idea of an enacted Bill of Rights as unnecessary, redundant, and practically ineffective, on the argument, strongly reminiscent of Judge Learned Hand,[1] that civil liberties rest on enlightened public opinion and not on laws; nor to those who would prefer to have the Bill as a full-blooded amendment to the Canadian Constitution along the lines of the American Bill of Rights; nor to those French Canadian jurists who, as in the case of past proposals for constitutional change or innovation in Canada, prefer to rest with the known constitutional traditions and the legal *status quo* lest the new and unknown should trench on long-cherished Quebec vested constitutional claims; and certainly not to those who, being generally left-of-centre in political orientation, wanted more far-reaching positions taken in the Bill of Rights in relation to the great issues of economic and social policy of the present day. The varied contributors (including the present writer) to a special issue of the *Canadian Bar Review* published in 1959[2] and devoted to the subject of the proposed Bill of Rights were virtually as one in their lack of enthusiasm for Prime Minister Diefenbaker's first draft of the Bill; and yet no significant lowest common denominator of agreement was evident in the professional legal commentators' detailed criticisms of the draft Bill. Of course, strong and even intemperate debate, and atomistic individualism are part of the facts of life of professional legal criticism in Canada, and it is not surprising that proposals for constitutional change in Canada have so often had to be resolved, in the past, through rather unsatisfactory or ambiguous compromise, or else shelved indefinitely for the future. Under the circumstances, and recognizing the immense practical difficulties and the inevitability of angry criticism, whatever Parliamentary course might actually be followed, there may have been

[1] See, for example, Hand, The Spirit of Liberty (Dilliard, ed., 1953); Hand, The Bill of Rights (1958).

[2] Canadian Bar Review, vol. 37 (March, 1959).

some temptations for Prime Minister Diefenbaker to follow the course of discretion and shelve his draft Bill, once the extremely mixed public reaction became apparent on the Bill's first reading in Parliament in 1958; and this may account, in part, for the extraordinary, two year delay between the first introduction of the Bill in 1958 and its final passage in 1960. In the event, the decision to go ahead in Parliament seems to have been a personal one with Mr. Diefenbaker. There is no doubt that Mr. Diefenbaker has strong personal views on the subject of political and civil rights, for his advocacy of a Bill of Rights for Canadians goes back as early as the 1940's when he was a mere rank-and-file member of the Conservative Party with no apparent, immediate prospects of party or national leadership. Perhaps the depth of the Prime Minister's personal feelings is best captured in his emotionally-charged speech in the House of Commons on July 7, 1960: "I can speak on the subject of mixed racial origin, Mr. Speaker. Had my name been that of my mother it would have been Campbell Bannerman . . . I know something of what it has meant in the past for some to regard those with names of other than British and French origin as not being quite that kind of Canadian that those of British or French origin could claim to be."[3]

In the two year time lag between first introduction of the Bill by the Prime Minister and its final passage by the House of Commons, a flood of comments and representations concerning the nature and contents of the Bill were invited, and actually received, from lay and professional groups. Unfortunately, the technical quality of these various representations does not seem at any time to have matched their enthusiasm or their prolixity. In any case, comparison of the original text of the Bill with that finally adopted reveals that only minor modifications were made, and these changes, it may be suggested, were generally for the worse from the viewpoint of internal self-consistency and styling of the Bill. Thus the original draft Bill opened, in the sober and economical (if somewhat dull) tradition of British-trained parliamentary draughtsmen: "Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows." In the final version adopted by Parliament in Ottawa, Her Majesty will now receive aid and comfort from a 113-word Preamble which "acknowledges" the "supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions"; and which also affirms "respect for moral and spiritual values and the rule of law." The main pressure for inclusion of such sentiments in the text of the Bill apparently came from various ecclesiastical leaders (mainly Protestant). In its actual choice of language and phrasing, the new Preamble clearly borrows from the text of the Irish Republican Constitution of 1937, which was avowedly intended to base a Catholic polity. In any case, in the transition in this, the preliminary, portion of the Bill from the original to the final version, there is a rather ironic historical parallelism to experiments in constitutional drafting in the politically unhappy Union of South Africa. In South Africa, the constitution, as originally enacted in 1909, opened with the informative but innocuous

[3] House of Commons Debates (Canada), vol. 104, no. 119, p. 5939, July 7, 1960.

statement: "This Act may be cited as the South Africa Act, 1909." In 1925, the Union of South Africa Parliament voted to amend the constitution by replacing this bald beginning with the rhetorical flourish: "The people of the Union acknowledge the sovereignty and guidance of Almighty God," the original opening being henceforth consigned ignominiously to the end of the constitution.[4] "In South Africa," as Professor R.T.E. Latham remarked, "sovereignty is less a term of art than a complimentary expression."[5] But perhaps in the case of Canada the relationship between exuberance in constitutional drafting and governmental dedication to implementation of the spirit and letter of the Constitution will be more proximate than it has proved to be in the Union of South Africa.

The essential point is, of course, that it is easy (and extremely pleasant) to draft a constitution; but all too often rather difficult (and tiresome) to try to ensure that the constitutional blueprint is actually carried out in practice. So many of the ventures in constitution-making since 1945—and there must have been at least a hundred new national constitutions drafted and adopted since World War II, if we consider not merely the West but also Eastern Europe, South-East Asia, and Africa—seem to Western observers to be mere "semantic" constitutions,[6] exercises in oratory unaccompanied by serious intentions even on the part of their drafters. The factual state of affairs is that all too often the constitution, though legally valid, has no integrated reality in its particular community: the constitution, in this sense, is "nominal" and not "normative."[7] The real question with the new Canadian Bill of Rights must thus be its utility in action. Will it give any extra teeth to the cause of civil liberties in Canada? Certainly, by virtue of its length and prolixity and the highly technical, legalistic character of much of the language of its substantive part, the new Canadian Bill of Rights is hardly likely ever to be learnt by heart and freely recited by school children as has been done with the American Bill of Rights, or even to be put to music and sung as with the United Nations Charter. The fault, in the case of the new Canadian Bill of Rights, is not so much with Prime Minister Diefenbaker as with the traditions of parliamentary and general legal drafting in the Commonwealth Countries; for we have always suspected elegance in language as being attained only at the expense of precision of meaning. All the same, in taking note, by comparison, of the limpid clarity of diction of the American Bill, one may yearn for the beauty in English composition of a Jefferson; or for the poetic grace of an Archibald MacLeish who is generally credited with having, as a United States Assistant Secretary of State at the San Francisco Conference in 1945, influenced the final choice of language of the United Nations Charter.

The new Canadian Bill of Rights, if it is to have a real impact on Canadian society at large, will, it seems clear, achieve it through the assistance that it lends to trends already set in motion in the Canadian courts, towards

[4] South Africa Act, 1909, as amended by Act No. 9 of 1925.

[5] Latham, The Law of the Commonwealth, in Hancock, Survey of British Commonwealth Affairs (1937) p. 532.

[6] Loewenstein, in Constitutions and Constitutional Trends since World War II (Zurcher ed., 1951), p. 204.

[7] *Ibid.*

implementation of a liberal, or more strictly, libertarian, jurisprudence. There have been some grounds, perhaps, for suggesting that in the light of Canadian Supreme Court judgments since 1949, a constitutional or legislative Bill of Rights is not exactly necessary in Canada, since the Supreme Court had been proceeding very effectively to elaborate, case by case, a set of fundamental rights or liberties of the private citizen to be enforced by the courts as against governmental authority. This group of what we might call common law rights, that is to say, judicially-created rights, as opposed to the notion of rights formally proclaimed or established in a written instrument, whether constitution or statute, has been given most striking expression in the specially concurring opinions, over a period of years, of Mr. Justice Ivan C. Rand of the Canadian Supreme Court: and it is in fact to Mr. Justice Rand that we owe, principally, the contemporary constitutional law notion of judicially-enforced "Rights of the Canadian Citizen"[8] that are to avail against overweening governmental power and which certainly include the classic liberties of speech, of the press, and of religion, proclaimed by a long succession of English juristic writers from Blackstone on through Dicey. It is true that Mr. Justice Rand's "Rights of the Canadian Citizen," as actually formulated by their author in a succession of cases, would apply only as against Provincial (State) authority—the particular political authority actually involved in the cases in which Mr. Justice Rand was presently sitting. But there is no reason to believe that Mr. Justice Rand would have so limited their application if the occasion for testing Dominion (National) authority had ever arisen before him; and in the "Padlock" case (*Switzman v. Elbling*) in 1957,[9] one of his colleagues, Mr. Justice Abbott, expressly indicated that in his own personal view these liberties applied as against both Dominion and Provincial authority.

Mr. Justice Rand's special position as to the "Rights of the Canadian citizen" was never formally and in terms endorsed by a numerical majority of the court and at the most probably commanded no more than three votes (Rand, Kellock, Abbott) out of the nine judges on the court. Its importance really lay in the fact that, with the backing of a solid core of liberals on the court and with the prestige of being formulated by the intellectually most outstanding figure on the court—a man whom many observers have felt to be the best constitutional law judge in the Commonwealth Countries of recent times—it could normally be relied on to swing the votes also of the more cautiously pragmatic, middle-of-the-road, members of the court, Chief Justice Kerwin, for example, and so win a majority in great political tension cases. This is in fact what actually happened in the *Saumur* case,[10] the *Birks* case,[11] the *"Padlock"* case,[12] and the *Roncarelli* case,[13] to mention only the

[8] See generally McWhinney, Judicial Review in the English-Speaking World (2nd ed., 1960).

[9] 7 D.L.R. 2d. 337 (1957).

[10] Saumur v. City of Quebec and Attorney-General of Quebec, [1953] 4 D.L.R. 641.

[11] Henry Birks and Sons (Montreal) Ltd. v. Montreal and Attorney-General of Quebec, [1955] 5 D.L.R. 321.

[12] Switzman v. Elbling, 7 D.L.R. 2d. 337 (1957).

[13] Roncarelli v. Duplessis, 16 D.L.R. 2d. 689 (1959); discussed in 37 Canadian Bar Review 503 (1959).

great constitutional *causes célèbres* of the past decade. Mr. Justice Rand is, however, no longer a member of the Canadian Supreme Court, the statutory rule that compels the retirement of Canadian Supreme Court judges (though not, at that time, Provincial High Court and other inferior judges in Canada), at the age of seventy-five, having required him to step down from the court in 1959, just when his constitutional views seemed ripe for more general acceptance on the court. So far as Mr. Justice Rand's "Rights of the Canadian Citizen" have no express warrant in the constitutional instrument itself but were derived by their author, so to speak, by necessary implication from the general nature and character of the constitution—the "spirit of the Constitution" or *Volksgeist*—their successful propagation and continuance as authoritative constitutional law doctrine depended in a measure on the personality of their author; and there might be some fear for their survival *qua* constitutional law doctrine, after Mr. Justice Rand's departure, among rather more traditionally minded judicial personalities remaining on the court. The new Canadian Bill of Rights, to this extent, should help to fill the gap by lending courage to the cause of judicial activism, and strengthening and assisting the further elaboration of the libertarian jurisprudence that has already made such headway. For the new Bill of Rights, as with Mr. Justice Rand's "Rights of the Canadian Citizen" concept, represents Natural Law concretized in a legal-constitutional sense, using the term natural law now, not in its original, more limited, sense of Roman Catholic, Thomistic, theories on law, but in the broader, more general sense intended by Coke and Blackstone, and certainly comprehended by Dicey, of ultimate or fundamental interests of the individual and private associations that are to be protected against executive-legislative abridgment. These particular categories of interests—conventionally, political and civil rights—are the interests associated in contemporary political thinking with what Dr. Popper has made into a term of art, the "Open Society" values.[14] They are well suited to a society that has a continuing belief in its own ability to progress and that emphasizes a continuing exchange of ideas as a stimulus to such progress, and that in general encourages and assists vertical social mobility. The further association with the Protestant ethic and the spirit of incipient capitalist enterprise (through Max Weber and the historian R. H. Tawney,)[15] is not completely fanciful, for these concepts really flowered in the England of the era from the First Reform Bill up to the close of the 19th century, with Dicey as as the high priest of the legal cult; and in the United States in the period from the end of the Civil War until the late 1920's, and except perhaps for the short period when the defenders of American capitalism temporarily lost faith in their future and their own continuing enterprise and sought to use the Bill of Rights for purely defensive legal purposes vis-à-vis their own economic special interests, acted as a stimulus and instrument of political progress. The new Canadian Bill of Rights should certainly assist the Canadian judiciary in breaking away from the essentially positivist, conceptualist, "black-letter-law" modes of constitutional interpretation which

[14] Popper, The Open Society and Its Enemies (1st ed. 1945).

[15] Weber, Die protestantische Ethike und der Geist des Kapitalismus (1904), (English transl., Talcott Parsons, 1930); Tawney, Religion and the Rise of Capitalism (1926).

were dominant in the era of the Privy Council's hegemony over Canada, and which ended with the abolition by the Canadian Parliament in 1949 of the appeal from Canada to the Privy Council.

As to the possibilities and limitations of the new Canadian Bill of Rights, for the future, under judicial interpretation, some points of criticism can here be usefully canvassed:

(i) The Bill of Rights is a legislative or statutory Bill, and not a constitutional Bill *stricto sensu*. For those who are American-trained, (as the bulk of Canadian law professors are), the fact that the Bill is not written directly into the Constitution (the B.N.A. Act, 1867) means that it is not paramount law, but rather some sort of inferior or second-class provision which is subject in any case (as a legal consequence) to overriding or repeal or amendment by later legislation by the Canadian Parliament. English-trained lawyers would contend in reply that the same is true of Magna Carta, the English Bill of Rights, and the Act of Settlement, but that nevertheless the English Parliament has not made a habit of repealing these measures; and some would even assert that the English Bill of Rights is often more effective, in spite of its being a mere legislative Bill, than the American Bill which is a paramount, constitutional Bill. The Canadian government's counter to the charge that the Bill is not written into the Constitution has been to point to the practical difficulties to securing an amendment to the B.N.A. Act today, looking especially to the complete *impasse,* since 1949, at securing Dominion-Provincial agreement to the devising of self-operating amending machinery for the B.N.A. Act. The government has also made a valiant attempt, by precise legislative drafting, to exclude any other than direct, explicit amendment of the Bill of Rights in the future, this being a guarantee against the so-called amendment *sub silentio*—the normal principle of English (and Canadian) statutory construction that a later, legislative act overrides an earlier to the extent of any inconsistency. This particular provision, a model of English-type legislative drafting (in its strengths and weaknesses), reads:

> "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights,* be so construed and applied as not to abrogate, abridge or infringe or to authorise the abrogation, abridgment or infringement of any of the rights or freedoms herein recognised and declared, and in particular, no law of Canada shall be construed or applied so as to . . . ."[16]

(ii) The Canadian Bill, it must be noted, is cast in highly general terms, as to its substantive guarantees. It speaks of "equality before the law"; of "freedom of religion"; of "freedom of speech"; of "freedom of assembly and association"; of "freedom of the press." It does not make clear, in terms, whether these are to be absolute or qualified freedoms. To take an example debated in some other of the English-speaking countries and

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[16] An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, 1960, s. 2.

answered rather differently by the judiciary in each case,[17] would the "freedom of speech" guarantee protect the Communist Party or Communist Front organizations against prosecution for sedition or similar criminal action? Would the same guarantee protect Jehovah's Witnesses against administrative control by local municipal authority on the score that a riot or other public disorders might break out in a predominantly Catholic community if the Jehovah's Witnesses persisted in attacking the Catholic Church?[18] Is the "freedom of speech" guarantee a viable defense to prosecution for breach of the Sunday observance legislation for, say, producing a play or staging a public performance of classical music on a Sunday? No firm answer can be given in Canada to such questions as these, having regard to the actual terms of the new Canadian Bill, at least as yet. The answer, sensibly, should only be given if and when a problem actually arises in practice, and then only in the concrete fact-settings of individual cases. What can be said now is that in the other English-speaking countries such constitutional guarantees have not been judicially interpreted or construed in an absolute form, the courts having recognized that the problem is one of choosing among competing social interests, of balancing the interests in speech against countervailing interests, whether in national security, public order, and the like. In this type of case, it is to be noted, American courts have tended to regard the facts of individual cases as all-important and to let the final decision turn, not on consideration of the competing interests in the abstract but on consideration of the administrative or machinery techniques actually used by the parties concerned to implement the interests in particular cases.[19] Thus, such an examination of the problem involved in the Jehovah's Witness case, referred to above, might indicate that the local city or police administration has been heavy handed or oppressive in seeking to impose a blanket ban or prohibition against the Jehovah's Witnesses, where a more moderate control, say, predicating the grant of permission to hold public meetings on maintenance of certain minimum (judicially reviewable) standards of debate, might have sufficed.[20] On the whole, though, in contests, in the United States, of the speech interest with other interests, it can be said that except where the interest in national security has been involved, the speech interest has generally prevailed. The main course of jurisprudence on the American Bill of Rights, over the years, in the area of "political rights," is very close to Mr. Justice Rand's own "Open Society" ideal: the historical roots of each national jurisprudence in a Protestant-derived, industrially-based, expanding economy, civilization-area, are clear.

A complicating factor, however, to any policy for the future of automatically following American constitutional precedents in Canada, is the

[17] Compare, for example, Dennis v. United States, 341 U.S. 494 (1951); Australian Communist Party v. Commonwealth, 83 C.L.R. 1 (1951); R. v. Sachs, [1953] 1 S.A.L.R. 392 (A.D.).

[18] Compare Saumur v. City of Quebec and Attorney-General of Quebec, [1953] 4 D.L.R. 641.

[19] See Freund, On Understanding the Supreme Court (1951) 27; per Frankfurter J., Dennis v. United States, 341 U.S. 494, 539 (1951).

[20] Compare Saumur v. City of Quebec and Attorney-General of Quebec [1953] 4 D.L.R. 641.

plural (more strictly dualist—English Canadian and French Canadian) character of Canadian civilization. Indeed, in his famous dissenting opinion in the *Saumur* case, in 1953,—a case concerning the constitutionality of a by-law of the City of Quebec which forbade the distribution in city streets of any pamphlets or tracts without the prior permission, in writing, of the city chief of police, the by-law having been applied by the Quebec police to members of the Jehovah's Witnesses organization—the then Chief Justice of Canada, Chief Justice Rinfret, suggested that in dealing with contests between claimed interests in speech and countervailing interests in the special fact-context of a Catholic civilization like French Canada, the Canadian Supreme Court should perhaps accord some extra degree of deference to community interests in public order.[21] The actual voting line-up of the judges on the Canadian Supreme Court in the *Saumur* case (in which the court, by a five-to-four majority, invalidated the by-law as applied against the Jehovah's Witnesses organization), and the positions taken by the individual judges in related cases, highlights the fact that English Canadian and French Canadian judges would tend to strike the balance of the competing interests in the speech cases in rather different ways,—a difference of judicial philosophy that is perfectly proper in a court of nine judges if one accepts the view that law is a reflection of ethical-cultural facts and that in a plural society all ethical-cultural strands should, as far as possible, be reflected in the positive law. On this point at least—the necessary relationship of law and society—French Canadian lawyers and the essentially American-trained English Canadian law professors seem to be methodologically as one. Enough has been said on this point, in any case, to indicate that the drafting and enactment of the new Canadian Bill of Rights is only the beginning of a problem and that the resolution of the problem—the translation of the Bill into working community practices and attitudes—will be, as it has been in the United States over the years, a continuing process, involving much judicial blood and sweat and toil and tears, and frequent judicial compromises and frequent reversals or changes of court decisions, as the impact of new facts on the judges produces new judicial conceptions of the ambit and complexity of the social problem. The very vagueness of the new Canadian Bill of Rights' formulation of the ambit and content of the basic, legally-protected, interests, may not, in this regard, be a disadvantage, but an advantage, in that it should facilitate a constant and continuing process of judicial adjustment to changed community conditions.[22]

(iii) As to the much debated Part II of the Bill with its War and Emergency exclusion provision, it must be recognized that this provision simply

[21] Per Rinfret C.J.C., dissenting, [1953] 4 D.L.R. 641, 659.

[22] In contrast to contemporary constitution-makers in other countries—see, for example, Mendelson, Foreign Reactions to American Experience with 'Due Process of Law,'" 41 Virginia Law Review 493 (1955); Frankfurter, Of Law and Men (Elman ed., 1956) 22; the drafters of the Canadian Bill of Rights have eschewed legal euphemisms in bravely following the language of the American Bill of Rights and proclaiming "the right of the individual to life, liberty, security of the person and the enjoyment of property, and the right not to be deprived thereof *except by due process of law*." An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, s. 1 (a).

reflects in positive law terms the ultimate political reality that in time of war and national emergency, ordinary constitutional law ceases in the sense that the defense power becomes the pivot of the constitution. The claims of unbridled executive-legislative authority, in these circumstances, were, after all, accepted by the highest British courts in the hallmark case of *Liversidge v. Anderson*[23] at the height of World War II, and by the American Supreme Court as recently as the Cold War era in the *Dennis* case decision in 1951.[24] The American Bill of Rights, it is to be noted, did not save the Japanese Americans during World War II from what sober American opinion recognizes as having been arbitrary, unwarranted security measures;[25] and it is difficult to believe that a Canadian Bill of Rights, if it had been in existence then, could have saved the Japanese Canadians from their rather similar fate during World War II. The truth is that the courts, in the War and Emergency situations, have always deferred to executive authority; the judges' influence can only really be exerted in peripheral situations, either after the emergency is over or else, as in the case of President Truman's seizure of the Steel industry in 1952,[26] where there is clear reason to doubt whether an emergency exists at all. The Canadian Bill of Rights at least has the virtue of candor and honesty in expressly recognizing, in the text itself, what the British and American and other Western democratic constitutional systems have (rightly or wrongly) always ended up recognizing as a matter of practice or law-in-action, that even the constitution itself must yield if the survival of the nation be in issue.

(iv) As to the enforcement of the Canadian Bill of Rights, the Bill itself is lacking in teeth, in that no mention is made of any special machinery provision for carrying it out in practice. The American Bill of Rights, of course, is similarly lacking: of all the current crop of constitutions only the Soviet Constitution of 1936 and the related constitutions of Eastern Europe seem to contain formal provision for their own implementation in their Bill of Rights sections; and these sections of the Soviet Constitution have usually been considered by Western specialists as being "nominal" only, in the special sense referred to above. The Canadian Bill of Rights, to this extent, is a negative contribution in that, as with the American Bill and all other similar Western experiments, its vindication in concrete cases depends on the initiative of private individuals or associations, whether as defendants in criminal actions or as plaintiffs in civil suits. The extraordinary cost of litigation, carried to the final appellate level, in Canada as elsewhere in the Western World, suggests that in Canada the Bill of Rights issues will be litigated, as they have been in the past, by a highly limited number of special interest groups or else not at all—aggressive proselytisers (like the Jehovah's Witnesses), Communists and Communist Front groups, or economic special interest groups like the large corporations and the Trade Unions. There is great truth in the statement, made only half in jest, by Glen How, who has been counsel for the Jehovah's Witnesses in their main

[23] [1942] A.C. 206.
[24] 341 U.S. 494 (1951).
[25] See, for example, Rostow, The Japanese American Cases. A Disaster, 54 Yale L.J. 489 (1945).
[26] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

contests before the Supreme Court of Canada, that the Jehovah's Witnesses, and not Prime Minister Diefenbaker, have given Canada her Bill of Rights. Almost without exception, the great decisions on civil liberties given by the Supreme Court of Canada since the War are the legal by-products of the pangs and sufferings of individual Jehovah's Witnesses at the hands of provincial or municipal authorities. Prime Minister Diefenbaker could supplement the civil martyrdom activities of the Jehovah's Witnesses and lend teeth to the new Canadian Bill of Rights by establishing a special civil liberties division of the Justice Department with special powers to investigate abuses and to initiate action for their correction.

(v) Lastly, in a community, as in Canada, where too much in the way of social activism tends to be left to other people, it is perhaps necessary to counsel against too easy acceptance of a public philosophy of leaving everything to the judges. The record of the Canadian Supreme Court in the last decade, in the public law field, has been a courageous and often inspiring one, but the very limits of the judicial process in terms of effective social policy-making require a large measure of community co-operation and positive community action if a civil liberties jurisprudence is firmly to be based in Canada in the future. There is still far too much of the more sophisticated forms of intolerance in Canada, in the nature, for example, of racially and religiously restrictive convenants as to housing and land, control of membership of clubs, and even perhaps admission to professional associations, matters not expressly caught by the new Bill of Rights and not always susceptible to being covered by the ingenuity of the legislative draughtsman. It is too much to expect that the Canadian judiciary, of their own initiative, can eliminate vicious community practices of this sort without a firm background of public support for the judges' position.[27] The societal limitations to the effectiveness of positive law are such that even with a bench of liberal activist judges the law can never get too far in advance of public opinion. As Learned Hand has written: "A society so riven that the spirit of moderation is gone, no court *can* save; a society where that spirit flourishes, no court *need* save; in a society which evades its responsibility by thrusting upon the courts the nurture or that spirit, that spirit in the end will perish."[28] Clearly, the fate of the new Canadian Bill of Rights will turn, in the ultimate, not on the courts, or even Parliament, or for that matter Prime Minister Diefenbaker, but on the "spirit of moderation" of the Canadian people.

The text of the new Canadian Bill of Rights is appended.[29]

EDWARD MCWHINNEY*

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[27] Though Keiller Mackay J., of the Supreme Court of Ontario, made a valiant onslaught against restrictive covenants as to religion, Re Drummond Wren, [1945] O.R. 778.

[28] Hand, The Spirit of Liberty (Dilliard ed., 1953) 164.

[29] Passed by the House of Commons, Ottawa, August 4, 1960; assented to, August 10, 1960.

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BILL C-79.

An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

As Passed by the House of Commons, 4th August, 1960.
(final version)

3rd Session, 24th Parliament, 8-9 Elizabeth II, 1960.

THE HOUSE OF COMMONS OF CANADA.
BILL C-79.

An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms.

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

## PART I

### Bill of Rights.

**1.** It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(*b*) the right of the individual to equality before the law and the protection of the law;

(*c*) freedom of religion;

(*d*) freedom of speech;

(*e*) freedom of assembly and association; and

(*f*) freedom of the press.

**2.** Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights,* be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(*a*) authorize or effect the arbitary detention, imprisonment or exile of any person;

(*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;

(*c*) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(*d*) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(*g*) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

**3.** The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

**4.** The provisions of this Part shall be known as the *Canadian Bill of Rights*.

## PART II

**5.** (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

**6.** Section 6 of the *War Measures Act* is repealed and the following substituted therefor:

(1) Sections 3, 4 and 5 shall come into force only upon the issue of a proclamation of the Governor in Council declaring that, war, invasion or insurrection, real or apprehended exists.

(2) A proclamation declaring that war, invasion or insurrection, real or apprehended, exists shall be laid before Parliament forthwith after its issue, or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting.

(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made.

(4) If both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect, and sections 3, 4 and 5 shall cease to be in force until those sections are again brought into force by a further proclamation but without prejudice to the

previous operation of those sections or anything duly done or suffered thereunder or any offence committed or any penalty or forfeiture or punishment incurred.

(5) Any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights*."

## ACT FOR THE PROMOTION OF INDUSTRIAL INVESTMENT IN THAILAND

It can be said without exaggeration that the new Act for the Promotion of Industrial Investment[1] in Thailand has not only repealed[2] but has also cured many of the defects of the previous legislation[3] and decrees[4] in this field. Most striking is the solution of the criticism raised by the undersigned in a previous comment thereon that "The uncertainty of obtaining certain specific benefits for a particular industrial enterprise and the wide, and possibly arbitrary, scope of administrative determination and restriction constituted deterrents rather than inducements to foreign investors."[5] The new Act specifically provides that the categories and sizes of industrial enterprises, which may include "farming, animal husbandry, fishing, transport and organisation of tourist facilities," eligible for promotion and/or any conditions in respect thereof shall be prescribed by Ministerial Regulation.[6] The President of the Council of Ministers is empowered to issue said regulations,[7] and by Ministerial Regulation No. 1,[8] there are set

[1] Act for the Promotion of Industrial Investment, B.E. (Buddhist Era 2503) (1960); given in the name of His Majesty King Bhumibol Adulyadej Sangvalya, on the 17th of October B.E. 2503. Vol. 2 No. CCIX Royal Thai Government Gazette, November 7, 1960. Hereinafter referred to as the "Industrial Investment Act."

[2] Industrial Investment Act, Section 3.

[3] Industrial Promotion Act, B.E. 2497 (1954).

[4] Proclamation of the Revolutionary Group No. 33, B.E. 2501 (December 5, 1958); Proclamation of the Revolutionary Group No. 47, B.E. 2502 (January 12, 1960).

[5] American Journal of Comparative Law, 9 (1960) 492.

[6] Industrial Investment Act, Section 5.

[7] *Ibid.* Section 34.

[8] Ministerial Regulation No. 1, B.E. 2503 (November 1, 1960) A few examples of those set forth are reproduced below:

| *No.* | *Category* | *Size* | *Condition* |
|---|---|---|---|
| 4 | Tin smelting industry | Daily production of not less than 20 metric tons of metallic tin. | Machinery and tools used must be approved by the Board and metal produced must not be less than 99.5 percent pure with smelting losses no higher than 2%. |
| 11 | Lead ore refining by the flotation method | Annual production of not less than 1,000 metric tons of lead ore concentrate containing 70% of lead. | Machinery and tools must be approved by the Board. |
| 13 | Rolling mill | Annual production of not less than 1,000 metric tons | Machinery and tools must be approved by the Board. |
| 21 | Can industry | Annual production of not less than 3 million 20 litre cans | Machinery and tools used must be approved by the Board and product quality must meet international standards. |

forth the category, size and conditions of 123 industrial enterprises eligible for promotion under the Industrial Investment Act.

It follows therefore that a potential investor whose industrial enterprise apparently conforms with the general criteria and terms of Ministerial Regulation No. 1 may file an application with the Industrial Investment Promotion Board,[9] (hereinafter referred to as the "Board"), on the forms and in accordance with the procedures described by the Board.[10] When the Board finds that an applicant is entitled to the rights and benefits set forth in the Industrial Investment Act and, upon the approval of the Council of Ministers, the Board issues a "promotion certificate" to the applicant.[11] The Board may, at its discretion, stipulate certain conditions concerning the exercise of the rights and benefits thereunder.[12] A promotion certificate may also be issued for the expansion of an industrial enterprise but the rights thereunder are confined to the expanding part of the enterprise.[13] It is to be noted that the Act provides for guarantees,[14] and rights and benefits,[15] which are automatically effective, subject of course to the above-mentioned discretionary conditions. The promoted person[16] is given the State's guaranty that the latter will not engage in any new (and presumably expanded) industry in competition with the industrial enterprise of a promoted person, and further will not transfer a private industrial enterprise to the State.[17] In addition, promoted persons are to receive the following rights and benefits:

> "(1) for promoted persons which are limited companies registered in Thailand or juristic partnerships registered in Thailand, authorisation to own land for industry as the Board finds proper even if it exceeds that which may be acquired under other laws;
>
> "(2) exemption from import duties on machinery, parts and accessories used in the industrial enterprise ordered or imported from abroad as approved by the

| *No.* | *Category* | *Size* | *Condition* |
|---|---|---|---|
| 24 | Barbed wire industry | Annual production of not less than 500 metric tons | Machinery and tools used must be approved by the Board and product quality must meet international standards. |
| 49 | Concentrated latex industry | Annual production of not less than 400 metric tons of 60% concentrated latex | Machinery and tools used must be approved by the Board and domestic latex must be used. |

[9] Industrial Investment Act, Sections 6–10, 11–14.

[10] *Ibid.* Section 15.

[11] *Ibid.* Section 16. The proper form of said promotion certificate is set forth in Ministerial Regulation No. 2 No. CCX of the Royal Thai Government Gazette, November 14, 1960.

[12] Industrial Investment Act, Section 17.

[13] *Ibid.* Section 17.

[14] *Ibid.* Section 18.

[15] *Ibid.* Section 19.

[16] The word "person" is not clearly defined. Presumably person includes both individuals and legal entities and is distinct from the word "industrial enterprise" only insofar as the latter constitutes the technical description of the industry to be carried on by the individual or legal entity.

[17] Industrial Investment Act, Section 18.

Board, provided, however, that such things of similar price, quality and type are not produced domestically in the required quantity;

"(3) for promoted persons which are juristic persons, exemption from income tax on profit from the industrial enterprise for the first year of operation in which there is taxable profit and for the succeeding year in which there is taxable profit, provided, however, that the said two years occur within a period of five years following the issuance of the promotion certificate.

"The provisions of the preceding paragraph shall not apply in the event promotion is granted for industrial expansion.

"(4) the right to take or remit abroad foreign exchange which represents funds brought from abroad for investment by the promoted person or profit arising from such investment, provided, however, that in periods when the balance of foreign exchange payments meets with difficulty necessitating reasonable husbanding of foreign exchange, the Bank of Thailand may temporarily for the said purpose suspend or limit such taking or remittance abroad.

"(5) subject to the immigration laws except as otherwise provided herein, authorisation to bring alien skilled craftsmen or experts into the country for the benefit of the industrial enterprise in such numbers and for such periods as the Board may find proper including wives and dependent children as approved by the Board whether or not in excess of quotas prescribed in the laws on immigration.

"(6) regular authorisation to export their manufactures or produce except when necessary in the interests of the safety or economy of the country."[18]

It should be stressed that by its wording the statute can be interpreted to mean that the above-mentioned guarantees and the rights and benefits are automatically effective for the promoted person although subject to conditions as may be set forth by the Board.[19] This, in theory, constitutes a marked improvement upon previous legislation and decrees because certain specific criteria are now set down for industrial enterprises which can apply for benefits and guarantees which in turn are apparently automatically granted to the promoted persons meeting said criteria. Thus much of the uncertainty and possible scope of arbitrary administrative determination has been removed, giving way to reasonable decision by the Board and the Council of Ministers with respect to such industries and such numbers thereof as they consider most beneficial to the economy of their country.

Administrative discretion has, however, not been eliminated entirely. Certain additional rights and benefits may be granted by the promotion certificate if the Board deems that the granting thereof is in the economic interest of Thailand. These additional rights and benefits may be one or several of the following:

"(1) for such period as may be found proper, suspension or reduction of export duties payable under the law of the customs tariff for manufactures and produce derived from the industrial enterprise;

"(2) for such period as may be found proper, suspension or reduction of import duties payable under the law on the customs tariff for materials, tools and equip-

[18] *Ibid.* Section 18. While the scope of this study does not permit discussion of the validity and enforceability of such a State guaranty, it can be assumed that the question of the immunity of the sovereign from suit would come into consideration. In this connection please see Sompong Sucharitkul, "The Rule of Law Under the Legal System of Thailand," and Journal of the International Commission of Jurists, p. 35, and the case of *Phy Preeda Narubate* v. *H.M. Government* 724/2490 (1947) in which the Court said: "Although the word *government* may refer to the central organ of the State or a group of persons, it is not a juristic person under the Civil Code or any other law and is not, therefore, a proper party before the Court."

[19] Industrial Investment Act, Section 17.

ment required for use in the industrial enterprise including prefabricated factory structures brought in for erection as industrial factories and equipment for the construction of such factories except such things of similar price and quality originating or produced domestically in the required quantity;

"(3) for such period as may be found proper, prohibition of importation of manufactures or produce of the same kind as produced by a promoted person under the law on control of certain types of imports and exports;

"(4) for such period as may be found proper, an increase of import duties payable under the law on the customs tariff for manufactures or produce of the same kind as produced by a promoted person."[20]

It should be mentioned that under Ministerial Regulation No. 2, 1 November 1960,[21] there are also provided the following documents which are to be attached to the promotion certificate:

"Document A: List of machinery, parts and accessories for use in the industrial enterprise in respect of which import duty exemption has been granted.

"Document B: List of materials, tools, equipment, required for use in the industrial enterprise including prefabricated factory structures to be erected as a factory for the industrial enterprise and construction accessories therefor in respect of which import duty exemption has been granted.

"Document C: List of materials, tools, equipment required for use in the industrial enterprise including prefabricated structures to be erected as a factory for the industrial enterprise and construction accessories therefor in respect of which import duty abatement has been granted.

"Document D: List of names of alien skilled craftsmen and experts including their wives and dependent children whose immigration has been authorised for work with the industrial enterprise."

These documents again constitute a positive step which lends certainty to the rights and obligations of the promoted person. Certain problems do, however, remain—for example Section 21 of the Industrial Investment Act, provides:

"In the event a promoted person dies or transfers the business to another, the promotion certificate shall continue to be valid for not more than 90 days from the date of death or transfer and if the heirs or transferee have not filed an application for promotion within the said period, the promotion certificate shall thereafter be invalid.

"In the event the heirs or transferee file an application for promotion within the said period, the provisions of Section 15 and Section 16 shall apply *mutatis mutandis* and the new promoted person shall receive only those rights and benefits remaining to the original certificate holder."

This provision raises the question referred to in Footnote 16 above with respect to the definition of person. It is not clear whether this Section refers only to "promoted person" as an individual and therefore would not be applicable to a promoted person as a legal entity. This entire point requires further clarification and it is hoped that this will be the subject of a subsequent Ministerial Regulation. Specifically, the regulation could define precisely what is meant by "a person" as set forth in Section 4 of the Act. It would indeed be surprising if the Act was intended to apply only to individuals and not to corporations or other legal entities, but there is no specific provision which gives the absolute assurance that the definition is all-inclusive.

[20] *Ibid.* Section 20.

[21] Ministerial Regulation No. 2, B.E. 2503 (November 1, 1960); to be found in Vol. 2 No. CCX Royal Thai Government Gazette, November 14, 1960.

In conclusion, it can be said that with the exception of the definition of person discussed immediately above, the Act provides a positive step forward in Thai legislation for the promotion of industry. One may still point to a certain, yet considerably reduced, area allowing for arbitrary administrative decision; particularly the discretionary benefits set forth in Section 20. It is hoped, however, that the interests of the Thai economy and sound administration will render this possibility nugatory. It might moreover be a great advance in the Administrative Law of Thailand and a greater assurance to investors if a specific provision for appeal against the negative decisions of the Board and the Council of Ministers could also be included in a subsequent Ministerial Regulation.[22]

C. D. M. WILDE*

[22] Providing for appeal to an administrative tribunal or the courts.

* London, England.

# Book Reviews

ANDERSON, J. N. D. *Islamic Law in the Modern World*. New York: New York University Press, 1959. Pp. xx, 106.

The contribution of Professor Anderson to the study of Islamic law is well-known to scholars on both sides of the Atlantic. As Professor of Oriental laws at the University of London and head of the department of law in the University's school of Oriental and African Studies, he is recognized as a notable scholar on Moslem law in the English-speaking countries.

The purpose of Professor Anderson's book is to present Moslem law to the Western lawyer and attract his attention to an unknown era of legal knowledge unique in character and amply rewarding in the study of comparative law. The book comprises a series of lectures delivered at the School of Law of New York University during the fall of 1958.

Five subjects have been treated in this book: In the first chapter, he presents an introduction to Moslem legal thought compared with modern Western legal theories. An interesting look at Moslem law was made with the eye of a student of Western theories of jurisprudence, to use Professor Anderson's own words. Although I am not in complete agreement with him on some points (whether or not Moslem law satisfies the criterion of laws in the Natural Law School), yet I admire the magnificent contrasts he has made between the two concepts of law in connection with the absence of reasoning in the law of Islam.[1]

Chapter two is entitled "Islamic Law and Modern Life: Reconciliation in the Middle East." In this chapter, Professor Anderson familiarizes the reader with the legal reform that has taken place in most of the Islamic countries over the last century, which provides "both a mirror and a gauge of their social progress and even national development," and which constitutes "a magnificent example of modernism in Islam, where theology and law goes hand in hand." I cannot afford to agree with the learned Professor in this respect. Modernization in the Arab World was not intended to be an amendment but rather replacement of this immutable law, the Shari'a, in many directions of societal relations for Western-inspired codes. Such legal reforms due to the political and social incursions of the West, is especially entitled to be examined and studied.[2]

[1] On this particular point, read another point of view in Arberry, J. J. Revelation and reason in Islam, The Macmillian Co., 1957; Rahman F., Prophecy in Islam, George Allen & Unwin Ltd., London, 1958.

[2] An adoption of the French Civil Code in Egypt in 1875 for the Mixed Courts and in 1883 for the National Courts cannot be viewed as reformation of the Law of Islam. It is noteworthy, however, that the present civil code of Egypt (of 1949) and the other Arabian codes influenced by it, have departed in many places, from the old codes. To mention a few examples, the theory of "Meglis al-Aqd" or the contract unity in place as well as time, representing an objective view in the formation of the contract, the apparent intention replacing the old Latin theory of the actual intention, exploitation as an impediment to consent, were all taken directly from Moslem Law.

The third and fourth chapters deal with two specific branches of Moslem Law, namely marriage and inheritance. I believe that these two specific branches were chosen because, throughout all the Arab World, Islamic Law still dominates these two fields. The hand of reform has not touched them yet.

Since Islamic Law is prevailing as such in all the Arabian Peninsula, survives and influences some parts of the legal systems of other Arabian countries, represents a coherent and distinguished system of law based originally on the Koran, it is still considered the key for the future in a very strategic part of the world, namely the Arab World.[3]

On this particular point, the importance of chapter five on the contemporary legal trends in the Moslem World, comes to the forefront.

Professor Anderson divided the countries where Moslem Law used to reign into three groups: (1) countries where Moslem Law is still the basic norm governing all legal relationships; a good example for this group would be Saudi Arabia and to some extent Yemen, Oman, and Afghanistan; (2) countries which have secularized their social life and where Moslem Law receives no application in their courts, the only good example for this group would be Turkey, (3) countries which are still able to compromise and to stay on the middle ground between the first two groups, namely the U.A.R., Iraq, Jordan, Lebanon, Sudan, Lybia, Tunisia and Morocco. In this latter group, Moslem Law is regarded as a fundamental source of legal rules in default of texts and custom, and prevails in certain types of legal relationships.[4] A firm concise study of each of these groups is made in this chapter.

Such diligent study of Moslem Law, in bringing the East to the West, serves as a tribute to a vital, resourceful and flexible system of law and as such will forward a better understanding between the West and the Moslem World.

SALAH-ELDIN ABDEL-WAHAB*

[3] J. N. D. Anderson, The significance of Islamic Law in the World today, 9 Am. J. Comp. L., (1960) 187.

[4] Family law, inheritance and wills are usually governed by Moslem Law, while crimes, procedure, civil and commercial matters are of Western inspiration.

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*International Symposium on Legal and Administrative Problems of Protection in the Peaceful Uses of Atomic Energy.* Brussels: Euratom, 1960. Parts I–IV.

This International Symposium is a mimeographed English edition of papers presented in several languages at the Conference convoked by the European Atomic Energy Community to Brussels in September 1960. The Euratom Commission, carrying out one of the main tasks entrusted to it, which consists in protecting nuclear workers and the population against the hazards of ionizing radiation,[1] succeeded in assembling a great number of

[1] This, of course, is a question to which a number of international bodies have been paying attention; thus, for instance:

—UNO, Scientific Committee on the Effects of Atomic Radiation (UNSCEAR);

—International Atomic Energy Agency (IAEA);

experts from the six Member countries as well as the United States and United Kingdom.

The Conference, which opened with an address by Mr. E. Medi, Vice President of the Euratom Commission, dealt with the problems of safety in four broad categories: (I) Basic legislation on radiation protection; (II) Workmen's compensation and radiation injuries; (III) The licensing of nuclear installations and materials; and (IV) International control of radioactive contamination (water-air-soil).

The assembly was to a great degree unique. In addition to representatives of the legal profession, there were specialists in nuclear industrial technology, health and medicine, radio-biology, atomic insurance, in addition to the ministers and high ranking civil servants from the Euratom states. That, however, did not impair, as might have been feared, congruity in the treatment of the subject matter. On the contrary, it permitted a very instructive and cohesive confrontation, on the one hand, of variegated professional issues encountered on the use of nuclear energy and, on the other hand, of different national solutions designed to meet such situations. The necessity for such close co-operation in the formulation of legal precepts could not have been better exemplified than by the well-meant criticism by Professor W. Bleeker, an eminent Dutch meteorologist. He pointed out in his paper (IV/1), that Euratom Articles 35–38, insofar as they concern contamination of air and measures to be taken against it, are wanting in technical clarity and are somehow at odds with the prevalent concepts in his branch of science. Evidently, the lack of harmony between the legal and scientific methods of thought endangers an appropriate application of the protective measures. And the purpose of the Symposium was to clarify the issues to prevent similar discrepancies in the future.

The reasons for the very positive results that the Symposium accomplished in this respect, were doubtless due to the fact that a great majority of the presented papers shunned generalities, closely examining and concisely presenting points specifically raised. Moreover, readers will often find extensive bibliographies, charts, tables, and other useful data in appendices to individual studies.

Of course, in this short review it is impossible to do justice to all the authors. Instead, it is hoped, a few notes may suffice to acquaint briefly the

—International Labor Organization (ILO);
—World Health Organization (WHO);
—Food and Agriculture Organization (FAO);
—UNESCO;
—World Meteorological Organization (WMO);
—International Commission on Radiological Protection (ICRP);
—Commission Internationale des Unités et Measures Radiologiques (ICRU);
—International Commission for Industrial Medicine;
—International Union for Pure and Applied Chemistry;
—Intergovernmental Maritime Consultative Organization (IMCO);
—Intergovernmental Safety of Life at Sea (SOLAS) Conferences; and with particular regard to Western Europe, besides Euratom, also:
—European Organization for Nuclear Research (CERN);
—Committee for Public Health of Western European Union (WEU);
—(OEEC) European Nuclear Energy Agency (ENEA).

readers with some points of interest in the work which certainly deserves their attention.

Papers in the first category principally sum up the arrangements undertaken in the Euratom Member states to carry out their *Basic Standards of Sanitary Protection*. In addition, there is a study of the British system, and the examination by Mr. E. E. Ferguson, of the U.S. Atomic Energy Commission, of similar problems as well as solutions adopted in Part 20 of the new United States regulations which entered into force on January 1, 1961.

Among studies inquiring into different approaches to workmen's compensation for radiation injuries, a detailed scrutiny of legal problems by Professor S. D. Estep, of the University of Michigan Law School, represents one of the most challenging reports. Dissatisfied with what he calls "justice by lottery," Professor Estep proposes a *contingent injury fund*[2] as the most rational and practical way for administering justice in non-specific radiation injuries. To be read in connection with this paper is an excellent medical counterpart by Professor Palmieri, of the University of Naples. He analyzed particularly the incidence of leukemia, the most typical nonspecific radiation injury, citing some interesting data from Hiroshima. Considerable bibliography is also appended. Contributions by Dr. JJ. Gillon, and Dr. Linthe, of the French and German Ministries of Labor respectively, succinctly present the legal situation in these two countries, while the U.K. Ministry of Pensions and National Insurance supplied an instructive description of the British system.

The licensing practices in the participating states are competently analyzed in almost every study in the third category. Articles by Mr. J. Vergne, of CEA, and Mr. J. V. Harispe, of the Public Health Department, on French legal techniques, by Dr. S. Halter, of the Ministry for Public Health, on the Belgian methods, and by Dr. L. Silverman, Advisory Committee on Reactor Safeguards, on the United States system in licensing nuclear installations deserve mention. Some interesting problems have been raised in connection with the determination of health and safety factors by Dr. C. Polavani, Mr. C. Sennis, both of CNRN, and Dr. A. Persano, of SELNI.

Questions of international controls of radioactive contamination are examined principally with respect to (1) problems connected with nuclear-propelled merchant ships, and (2) standardizing of monitoring and control of other radioactive contamination. In the first part, Mr. W. H. Berman and Mr. L. M. Hydeman, of the Atomic Energy Research Project at the University of Michigan, after an extensive analysis, suggest recognizing the IAEA as an evaluating body for ship nuclear safety measures, authorized also to issue safety certificates to nuclear-powered merchant ships of all nations. This idea has many merits, especially since the IAEA has already been entrusted with some tasks in this field.[3]

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[2] *Cf.* also E. B. Stason, S. D. Estep, W. J. Pierce, *Atoms and the Law*. Ann Arbor: The University of Michigan Law School, 1959, 514–527, where other details of this idea can be found.

[3] Thus in disposal of radioactive waste. The progress made could be followed in the IAEA Bulletin (1960), Vol. 2, 3:14, and its Special Number, November, 1960. Recently, the IAEA expanded its interests also to atomic vessels. In co-operation with the Intergovernmental Maritime Consultative Organization (IMCO), the IAEA organized

The second part, which includes the above-mentioned article by Dr. Bleeker, is in many ways quite technical. Yet, it closes with a highly interesting note by Dr. J. Spaander, of the Dutch Public Health Institute, on human behavior in case of major accidents. Applied to a potential nuclear catastrophe, it convincingly shows that should the efforts of the governments, lawyers, and scientists be successful in protecting the population, much more education will be needed to make people aware of the lethal consequences of ionizing radiation.

On the whole, Euratom should be congratulated on staging this Symposium. But let it be also hoped that the present mimeographed English edition will be soon replaced with a book in which some of the tables and other data now missing will be found.

JAROSLAV G. POLACH*

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an international symposium on atomic vessels in Taormina, Italy, in November, 1960. Some 140 scientists and technicians from 19 countries participated in this first worldwide special meeting on nuclear propulsion. See IAEA, PR 60/96, 97, 98.

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ZOGHBI, H. *La responsabilité aggravée du transporteur aérien. De Varsovie à La Haye par Paris et Rio de Janeiro.* Beyrouth: Imprimerie Catholique, 1960. Pp. xxvi, 223.

The law regarding documents of air carriage and liability of air carriers has been very effectively unified by the "Convention for the Unification of Certain Rules Relating to International Transportation by Air," done at Warsaw on October 12, 1929, which has been ratified or adhered to by most of the States participating in international air traffic and transferred by not a few of them into their national legislations. However, the Convention was not without its defects and infirmities, which after many years of rather meandering deliberations eventually led to its amendment by the Hague Protocol of September 28, 1955. The Protocol has not yet entered into force, but it may now be expected that the necessary number of thirty ratifications will be reached in a near future.

With regard to the air carrier's liability, the system of the Convention, which as such has not been changed by the Protocol, may be summed up by the following formula:

Within certain limits, the carrier is liable for damage sustained by his passengers or caused to goods on board without fault being proved by the claimant.

The carrier is not liable if he proves that all necessary and possible measures to avoid the damage have been taken.

If on the other hand, it is proved that the damage was caused by the wilful misconduct of the carrier (or of his agents and servants), his liability is unlimited.

As the title implies, it is this latter régime of unlimited liability which is the main subject of the present dissertation, which the author presented at the University of Paris in May, 1959.

In a first chapter he outlines the normal régime of limited liability, then

follows the main chapter on the extraordinary régime of *"l'aggravation de la responsabilité,"* and the third chapter is dedicated to the influence of this régime on national legislations. The author's main conclusions may be summed up as follows:

The technical and economical changes which have developed since 1929 have not yet led to a situation in which as a basis the system established by the Convention can no longer be supported and justified.

However, the aggravated régime of unlimited liability is only justifiable in relation to the privileged régime of limitations, and further developments will eventually result in a situation which will require a suppression of the privilege as well as of the aggravation, and thus in a uniform régime of liability.

Developments toward this goal should proceed by successive steps and, under the authority of the International Civil Aviation Organization, by intermediation of the following special international agencies which the author proposes should be newly established:

(1) A judicial institution to ensure uniformity of the application of air law by the courts (*la jurisprudence*),

(2) A judicial or administrative institution to ensure enforcement of decisions rendered by national jurisdictions,

(3) An insurance institution to ensure payments for damages in air transportation,

(4) A financial institution to assist air lines in financial difficulties and to ensure their adaptation to technical developments.

The study serves a very useful purpose by outlining the technical and economical basis of the liability system established by the Warsaw Convention, by analyzing the practical experiences and the decisions rendered under the Convention since its entering into force, by clearly defining the difficulties and outlining the deliberations which led to the Hague Protocol of 1955. Its undertaking is most deserving and meritorious, and its concluding proposals, if bordering on the unrealistic to-day, will merit serious consideration.

The work has thus its own merits on which it will be weighed, and its introduction by not less than half a dozen of eminent lawyers and students (Chauveau, Chevallier, Garnault, Georgiades, de Juglart, Lemoine) is somewhat less than necessary. The different tunes of this new-fashioned overture are not all of the same quality, and abundance begets indifference. The more so as this heralding cannot hide anyway some soft spots which must be registered as well.

The references to national legislations are as a rule second-hand only and not as reliable nor as precise as one might wish them to be. For example, writing on the consequences of contributory negligence in Swiss law, the author cites legislation of 1920 which has been obsolete many years since.

The bibliography is rather incomplete even as a *"bibliographie sommaire,"* and many substantial contributions are passed over in complete silence. The present reviewer does not complain that he never found his own name, but it is a real pity that neither Koffka/Bodenstein/Koffka's *"Luftverkehrsrecht"* (1937) nor Drion's *"Limitation of Liabilities in International Air Law"* (1954) nor Abraham's *"Luftbeförderungsvertrag"* (1955) nor Perucchi's

*"Daños en le Transporte Aéro Internacional"* (1957) are listed. With exception of the "Journal of Air Law and Commerce," the author seems to have no knowledge of any air law journal published outside of France, and neither publishers nor places of publications are listed in the bibliography.

References to other publications are frequently without sufficient dates and even misleading (e.g., the reference to O.A.C.I. Doc. 30 in footnote no. 32 or to Doc. 36 in footnote no. 37). With regard to the leading case of *Baloise vs. Air France* of 1958, it is very nice to have the reference to the *Revue Judiciaire Libanaise* (p. 97), but a reference to the *Revue Française de Droit Aérien* would very probably have been more useful for most readers.

The great number of printing errors stems from the same spirit of not caring too much for the somewhat irksome finishing touches needed in such a publication.

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MANCA, P. *The Italian Code of Navigation (Translation and Commentary)*. Milano: A. Giuffre, 1958. Pp. 475.

PROPP, H. *et al. Das Seerecht der deutschen demokratischen Republik*. (2nd ed.) Berlin: VEB: Deutscher Zentralverlag, 1960. Pp. 839.

It would certainly be extremely helpful for those involved with problems of maritime law on an international scale if foreign legislations, particularly those of the major maritime countries, were easily accessible.

The author, an expert in the field of maritime law, realizing that translations of foreign laws can be of great assistance, as they can serve various practical purposes in view of the particular nature of the shipping industry and its connection with various nations under a variety of circumstances and relations, presents a useful work aiming, as he states in the preface, at placing "foreign jurists in a position to know something of Italian statutory legislation, legal opinions, and cases in the maritime field."

Obviously, his work is not addressed only to proctors and judges, but also to legal theorists, and it gives a first-hand idea of the Italian law on the matter, while at the same time it opens the way for further research.

The work consists mainly of a fairly good translation into English of the Italian Code, which deals not only with navigation at sea, but also with air navigation. The main topics of the Code, particularly those which are theoretically and/or practically likely to be of greater importance, and are of actual international interest and application are briefly annotated. The annotations, necessarily short, elucidate the respective sections of the Code, explaining briefly the text and, where necessary, the terms used in the translation. They give the highlights of theory and practice, supplemented by references to various writings of jurists, as well as to judicial decisions, though the latter appear in a rather limited number.

The translation would possibly be more realistic and lively if the author had adopted terms more familiar to the Anglo-American legal vocabulary, e.g. liens instead of privileges (pp. 272, 276). However, an unlimited use

of foreign terms is at times difficult, if not impossible, due mainly to their potentially different content in the legal system from which they are taken. The work would be more complete if the author had continued his very useful annotations in the second part of the Code (art. 687–1079) dealing with air navigation, which is a relative field of fast expansion and increasing importance.

The legislative activity of East Germany has apparently been very intensive, with a view to reconciling old institutions and statutes with requirements of the present regime, and to transforming old or to create new organs, necessary to incorporate and carry out the doctrines and notions of communist ideology.

This book, designed principally to meet practical needs, is an elaborate collection of extracts of the most important statutes, decrees, and regulations dealing with maritime law. The fact that the material covers to a great extent administrative areas, and that it has been compiled by a team headed by a captain, shows quite clearly that the book is primarily designed to answer the questions of ship personnel rather than of jurists.

The content of the book is classified *ratione materiae* in fourteen categories. This classification makes it comparatively easy to locate a topic looked for. Various intra-Eastern European countries' conventions supplement the maritime law part of the old German Commercial Code (HGB). Other international, older and contemporary, conventions, are included in the book, but only so far as they have been adopted, and agree with new political orientations of the state.

The abundance of regulations, etc. of an administrative nature, which are of a purely or principally local interest, and the fact that the merchant marine of Eastern Germany comprises only a few ocean-going vessels, gives the book a rather limited international use and importance.

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KIMBALL, S. L. *Insurance and Public Policy*. Madison, Wisconsin: The University of Wisconsin Press, 1960. Pp. xii, 387.

This book is subtitled, "A Study in the Legal Implementation of Social and Economic Public Policy, Based on Wisconsin Records, 1835–1959." The subtitle suggests the direction of the book. It is not a book dominated by personalized political, social, and economic discussion of controversial insurance questions considered to be in the realm of "public policy," such as governmental versus private insurance plans, or national versus state control over the insurance industry. This is a book by a legal scholar who has studied official conduct in the state of Wisconsin—the acts of its legislators, administrators and judges—and the milieu of that conduct—to ascertain how in the course of more than a century the legal framework of the insurance business was fashioned in that state. Legislative journals, statutes, reports of administrators, and opinions of judges have been explored, as well as a good deal of contemporaneous comment and information (fuller

sometimes than others) and the results put into focus by intelligent organizing power.

The product is a fast-moving, easily read book on legal history, saved from dullness by a crisp, reportorial style and an eye for the main chance. This is a modern book on legal history. It is not legal history disembodied, separated like a ghost from economic and social setting. It is rather a study of law and society, law affecting and affected by the institutions it purports to govern. Public policy is pragmatically discovered, in official act articulating or demonstrating a kind of public policy as they attempt to strike balances between competing interests. Law, as the embodiment of public policy, is seen as market-oriented, but not entirely so, for accommodations must be made to the nonprofit motives of co-operative interests.

A functional approach accounts for the organization and accents of the book. It is primarily a study in "social engineering," how the government of the insurance business was worked out in terms of legal standards. Legislation had more to do with this structuring than adjudication. Professor Kimball sees the judges as playing but minor parts, since the framework of law governing the insurance business was largely of statutory origin. Perhaps he sometimes underemphasizes their enormous interpretative power over statutes. But by and large, the emphasis is correct: the ad hoc, step-by-step processes of the common law, impeded by tradition, were not efficient instrumentalities for determining the rules for the government of the insurance business. In this study of democratic responses and adjustments to social and economic needs for security, we read of the progression from special incorporation to general incorporation acts; legislative approvals keeping pace with burgeoning types of insurance coverage; early solicitude for mutual insurance companies in days of capital scarcity, and a developing clash between mutuals and stock companies as mutuals sought to retain their advantages; the tightening of capital requirements as the market economy grows; increasing governmental intervention in investment, managerial, and marketing practices; conflicts between interests in the treatment of out of state insurance companies; controls over rates and policy forms; the administration of claims; taxes on insurance companies; the work of the insurance commissioners; and much else that had to do with insurance law in Wisconsin from the beginning of its history.

His choice of Wisconsin is fortunate. The time span of its growth covers the modern period of proliferation of the insurance business. The available records in this medium-size state are ample for a study in depth. The state has been a lender as well as a borrower, pioneering with the enactment of the first workmen's compensation law in the United States, and the first unemployment compensation law, and in other important matters, such as its valued policy law, state life insurance program, state fire insurance fund for public buildings, direct action against auto liability companies, and credit life insurance controls.

The importance of this book should not be downgraded because of its concentration upon insurance law developments in one state. In the first place, there are enough references to what was happening in other states and in general to put the main theme in proper context. In the second

place, we have here a correct approach, possibly the first of its kind, toward a picture of the way insurance law developed in the United States. Within the scalable walls of its own boundaries, each state has created a legal framework which has indigenous and nonindigenous components. No state has been completely an island unto itself; but each state is a laboratory for experimentation and devising. We find in this study many examples of the curious medley of localism and generalism which makes up the insurance law of a state. Sometime, perhaps, when more studies like this have been produced, and we get more insights into what happened in particular states, it will be possible for someone to write a definitive history of the development of insurance law in the United States.

In the meantime, students of comparative law and others will find in this book much that is thought-provoking, much that helps to clarify perspective, as they seek answers to some of the riddles of our federal system.

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LEHMANN, H.—NIPPERDEY, H. C. (Eds.): *Recht und Wirtschaft. Festschrift für Justus Wilhelm Hedemann zu seinem 80. Geburtstag.* Berlin: Walter de Gruyter & Co., 1958. Pp. xii, 266.

The present Festschrift contains a series of contributions offered by his colleagues, friends, and former students to J. W. Hedemann on the occasion of his 80th birthday. Hedemann's scientific work is mainly concerned with the development of German private law and German economic legislation. His field of interest, however, includes also problems of legal history and comparative law. As usual, the contributors to the Festschrift treat subjects connected in some way with the activities of the eminent colleague to be honored by the Festschrift.

The most interesting contributions from the point of view of comparative law are those dealing with the effects of Article 3 of the Basic Law (Constitution) of the Federal Republic of Germany proclaiming the equality between the two sexes. Such a rule in itself does not appear very revolutionary. As a matter of fact, it figures in most modern constitutions, as well as in the previous constitutions of Germany. However, in Western Germany after 1949, the fighting spirit of feminist organizations, aided and abetted by the innate love of thoroughness, succeeded in interpreting that rule in a way not dreamed of in other countries, in spite of the existence of similar rules in their constitutions. For years, any criticism of that development was considered rather reactionary. It is all the more refreshing to see that Beitzke and Boehmer devote their articles to criticizing the more blatant absurdities of the present interpretation of that principle in the field of civil law. At the risk of displeasing some powerful women's organizations they point out, that a perfect mathematical equality between the two sexes simply does not correspond to the present realities of social life in Western Germany. Of course, the legislator did comply with the absurdly wide interpretation of the relevant constitutional rule alluded

to above, but he merely succeeded in creating rules in contradiction with the facts of life, e.g., in the field of maintenance law (Beitzke) and financial relations between spouse and third parties (Boehmer).

Most friends and enemies of antitrust legislation will be astonished to hear of the venerable ancestory such legislation may claim. According to v. Brunn, antitrust legislation existed already in ancient Rome, the old Romans even had the same word for it as the Sherman Act. They, too attacked and punished restrictive trade practices as a "conspiracy" (*conjuratio*). Fehr's contribution to the Festschrift does not follow the general pattern. It is not an article on some scientific topic but contains charming personal recollections from 60 years of academic life in Germany and Switzerland, which in one way or another are also connected with the person of Hedemann. Fischer discusses how far commercial partnerships, which under German law do not enjoy the status of juridical persons, shall nonetheless enjoy the right to sue and be sued under their own name. Gieseke deals with a very topical problem, the "right of way" authorizing the laying of gas or water pipes, oil pipes, etc., as well as the construction of electric power transmission lines (as well as of telephone and telegraph lines) in or above real estate belonging to a third person. Hueck denies that there exists a *general* duty in German law, which would oblige an employer to re-employ an employee whom he had previously dismissed whenever such re-employment would appear "equitable." He approves, however, two decisions by the Federal Court and by the Federal Labor Court, which granted such a right of re-employment to former employees, who had been dismissed after a criminal conviction, while subsequently they were found to be innocent. Lange's contribution is an eloquent plea to German industry to employ scientifically trained managers and to have recourse to management and reorganization advisers. Lehmann investigates the reasons which should exclude civil liability in case of damages. Nikisch discusses problems of strikes and lock-outs. Nipperdey treats the distinction between a commercial representative, who acts as sales-agent of a firm, and a so-called "general representative" who sells the goods of another firm under his own name. The contribution by Siebert is concerned with certain aspects of the German law of inheritance.

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NORTHROP, F. S. C., *The Complexity of Legal and Ethical Experience. Studies in the Method of Normative Subjects.* Boston: Little, Brown and Company, 1959. Pp. xvi, 331.

This book has obvious merits and some obvious shortcomings. Its chief merit is the confrontation of legal and ethical thought with various powerful methods of science. Its chief shortcoming is that such an ambitious program could not be achieved by collecting 19 papers previously published in various periodicals, and adding three chapters now first published. Such a program would have deserved *monographic* treatment.

Nor is the author unaware of the shortcomings. He regards his book as a "prolegomenon." Originally, his plan was to include an "analytically

linguistic statement of the thesis" as well as "application to many cases which is necessary to show that the method specified is effective practically." "When the attempt was made to do so, however, it was found that the woods became obscured by the particular trees so that the over-all thesis was thrown out of focus" (xii).

Since the author hopes to eliminate these two limitations in future volumes, the present volume is to be regarded as a feeler, and candid criticism is the more warranted.

The author sets out to demonstrate that "evaluative as well as descriptive normative experience is cognitive" (xi). At the end of the book the line of argument is summed up in a few words: any normative theory assumes specific non-normative cognitive assertions concerning first-order facts. By distinguishing first-order and second-order facts—and by disentangling the different types of conceptual meaning in normative discourse—analysis is able to submit the rival de facto normative theories to an empirical and hence a cognitive test. Hence, evaluative as well as descriptive law and ethics are sciences (300).

This final result will be better understood if some of the steps leading to it are noted. Thus, the author shows that it is circular and question-begging to test any normative theory against the denotatively given values of any culture, since specific values reflect a specific philosophy. This, he adds, is the real error in the culturalistic fallacy of attempting to derive the "ought" for culture from its "is." And he concludes: nature rather than culture must be the source of verification (243).

It will be helpful to note as well that the author means by first-order facts natural facts antecedent to scientifically verified philosophical theory. Cultural facts, on the other hand, are second-order facts. His basic idea becomes more clear by his formulation: "by making the first-order facts of nature and natural man the source of verification of the philosophical theory, conformity to which in human conduct defines the good for culture and cultural man, one obtains a philosophically grounded norm for culture different from the 'is' of culture, which is nonetheless verifiable" (246).

In the formulation of the final result at the end of the book, there is specific emphasis on disentangling different types of conceptual meaning. The author distinguishes concepts of intuition, whose entire meaning refers to something immediately experienced with radically empirical directness (275), from concepts by postulation, the meaning of which is constructed or proposed by the specific postulates of some deductively formulated theory (207). Clearly, 'blue' in the sense of the electromagnetic wave with a specific length of 4862 angstroms is an object inferred from but not contained in the all-embracing immediacy of experience (175).

This distinction has grave consequences for law and ethics. Indeed, the author in his final schema assumes both "imageless concepts by postulation" and "nominalistic concepts by intuition" (275). He takes over from Oriental lore the "undifferentiated aesthetic continuum" (205), while he identifies "the method of knowing unique to Western science and philosophy" with that by concepts of postulation. These concepts are "real universals" (190, 213). Democritean or Newtonian atoms are entities satisfying certain universal mathematical laws; in other words, they are individual entities, the

essential nature (that is, the scientific definition) of which is to be an instance of a determinate universal law (213).

This is perhaps the fundamental idea of the whole book with its all-important corollary: "it is from this concept by postulation universal derived from Greek science that Zeno, Cicero and the Roman Stoics, who created Western ethics and Western law with its theoretically constructed technical technology, arrived at their concept of a moral and just man as an individual who is an instance of a determinate universal law" (213).

On the basis of these preliminaries, the author, in the last chapter, establishes "Normative Theory B." This has three premises and four requirements. The *first* premise assumes that any person is not merely his variable and perishable self but also his "all-embracing indeterminate field consciousness self." This, entailing that all entities "are not merely equal, but also identical," is a concession made to Eastern philosophies which, though different, are said to be "compatible with the contractual morality and law of a modern, freely democratic society" (275). The *second* premise assumes that the person is also a "directly unobservable, theoretically known individual which is an instance of an imageless formal constructed universal law." The *third* premise assumes that this person is the correlation of the two components of personality specified above.

The criterion of the ethically good and the legally just is derived from Premise 2 in the following way: To say that any substantive content $s$ of any object of intrinsic value judgment $x$ is morally good and legally just is equivalent to saying that

(1) $x$ is in accord with a law $L$ which is universal, being preceded by the universal quantifier [p] which mean "for any person whatever."

(2) Also the substantive content $s$ within the law must be accompanied by a second universal quantifier [p].

(3) The validity of any [p] L including [p] $s$ must rest on free implicit or explicit consent of the parties concerned.

(4) There are concepts by formal imageless postulation of a logical realistic epistemology.

The author's formula has been outlined in some detail above, in order to let the salient features stand out more clearly. It should be noted, first of all, that equal stress is laid on both the form and the content of law, whether moral or legal. Next, it will be observed with some astonishment, that little, if any, difference is made between the ethically good and the legally just.

This may be the reason why the individual escapes this formula after all. For the sole postulate that it be an instance of a universal law certainly is no satisfactory principle of individuation. Here the shadows of Leibniz and Mill seem to threaten the author's formulation. For nothing can assure that the content of a universal law, of which the individuum is the sole autonomous legislator in Kant's acceptance of the term, be necessarily the same as the content of a universal law which tautologically results from the assent of individuals, implicit or explicit. This, the difference between moral and social legislation, is a serious stumbling block which the author hardly succeeds in surmounting.

Nevertheless, we should not deny a certain beauty in the derivation from a postulation, by way of tautology, of the existence of obligations, interna-

tional law, or majority rule. Whoever clamors for rights also assents to duties, since to be a person in law means to be an instance of a universal law (which cannot grant rights without creating reciprocal obligations). International law also seems to follow tautologically from being a person, since universal law—embodied in the self-evident truths of the Declaration of Independence—is not confined to the 'incomplete symbols' of any nation. Lastly, majority rule is assured by the principle of legal induction. This—like Peano's Fifth Postulate, valid for *any* natural number—vouchsafes that a majority approved statute, which in judicial review satisfies the basic postulate of a universally quantified law and its content, clears away "the problem of going from what is true for some to what is obligatory for all" (299).

There is, I repeat, a certain elegance in these derivations by way of tautology. Do they also govern the course of events, the historical process? Confronted with the question, the author points to the complexity and confusion of moral and legal experience. For the latter, naïve realism in what he calls the law of status, and legal positivism are made responsible. Especially his criticism of Hobbes and Austin suffers from being insensible to both the nominalistic matrix of the former and the self-correcting logical acumen of the latter, as well as to the historical context of their writings.

It is interesting to observe that this study of what is ethically good and legally just issues in the problem of change. For a combination of the methods of science and law should enable us to govern change. Northrop frankly believes that his scientifically verified just law would easily materialize if only the confusion in peoples' minds were cleared up. But then is it not somewhat queer that his postulates are embodied, to his satisfaction, in his own country only? Is this not the same parochialism he objects to in the case of British empiricists? (254).

And here the ultimate question emerges. Does ethics and law indeed require, assume, or presuppose science or philosophy? Or, to put it more sharply, is law indeed *ancilla scientiae vel philosophiae?* A cautious answer would probably emphasize that law in human society is certainly not the same thing as cosmic law, nor the moral law within us. Nor is it entirely different. Euclid's, Newton's, or Einstein's laws cannot simply be written into the law of the land. Yet the Stoa had traceable influence on Roman Law, and Newton to some extent inspired Bentham and codification in general. The undertaking of the author is in the tradition of American scholars, such as Cook, Underhill Moore, and some of the legal realists who took the relevance of science for law seriously. Yet caution is not superfluous in that the lessons of science are to be understood in a much more roundabout, indirect, and sophisticated way than usually happens. And it must be said that the treatment in the book of this difficult problem is hardly promising if all that results is the rejection of the law of status in exchange for the law of contract, that is, universal quantification of the form and content of the law. Jefferson, on whom Northrop relies, may have given up newspapers in exchange for Newton and Euclid, but he could also have written the Declaration of Independence without consulting them—just as the Stoa could have been perhaps the same without Euclid.

One would heartily wish that this fascinating book were properly appreciated in spite of the enormous difficulties of the subject, and that the author himself may in the future succeed in conquering these difficulties. In the meantime, this book should be consulted by all concerned with the advancement of legal science. It should be consulted all the more as they increasingly become aware of the elusive subject-matter, in pursuance whereof one should not put oneself either on a too high or a too low cothurn.

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# Book Notices

SCHLOCHAUER, H. J. (Ed.) *Wörterbuch des Völkerrechts.* (2nd completely revised edition of the work originally edited by Karl Strupp). Vol. I (*Aachener Kongress to Hussar-Fall*). Berlin: Walter de Gruyter, 1960. Pp. xix, 800.

All those interested in the progress of the science of international law will rejoice at the news of the re-edition of Strupp's classical *Wörterbuch*. The new editor-in-chief, Professor Schlochauer, has undertaken this tremendous task in collaboration with Professors Krüger, Mosler, and Scheuner in conjunction with the Deutsche Gesellschaft für Völkerrecht. They must not only be congratulated on having taken this initiative, but also on the way in which they have realized their aim. This is no mere re-edition of Strupp's *Wörterbuch* which has been out of print for a long time. Practically all articles have been rewritten. Many of those in the former edition have been replaced, making way for a vast number of new articles. The former edition therefore retains its value, especially in respect to documentation of events prior to World War II.

The new edition is due to the collective efforts of German-speaking scholars from all parts of the world, this side of the Iron Curtain, old and young. The articles are devoted either to leading cases or to general topics. Ample use is made of cross references to link these two types of articles. As far as bibliographical data are concerned, the authors were requested to mention only the most essential works that appeared before 1945, while from there onwards the bibliography aims to be as complete as possible, including of course also articles in foreign languages.

It is not easy to evaluate the contents of a work due to so many contributors. Obviously, it is the aim of any reference work to give not only complete, but also impartial information, to distribute space according to the relative importance of the topic concerned, and to achieve a certain unity of representation. As far as it is humanly possible for a reviewer to ascertain such facts, these aims appear to have been achieved in the new edition of the *Wörterbuch*. However, an uneasy thought lingers at the back of the reviewer's mind. No doubt, the eminent authors and editors of the first edition were animated by a similar desire and contemporary reviewers were similarly of the opinion that they too had achieved this aim. Yet, when the authors of the present edition were confronted with the work of their predecessors they were quite frequently embarrassed to see how deeply the trauma of Versailles had influenced the presentation of certain articles. Looking back after 40 years, it was of course easy to remedy such a situation, but the anxious thought remains: was our generation really more successful in its groping for objectivity than our illustrious predecessors? Are not all to a certain extent blind to the prevailing influence of our own times? Which of our own likes and dislikes are so deep-rooted that we fail to recognize them for what they are and consider statements reflecting them as objective? Where will the critics of 40 years hence attack our own work? Will it be for the faith

in European Unification expressed in many of these articles or will the attack be directed against some other points? But who can foresee the future? For our own times, this magnificent work seems to fulfill all reasonable requirements.

Some details of course will always be open to criticism in a work of such magnitude. I am well aware how difficult it must have been for the editor to have achieved the present degree of uniformity of the various contributions, without using dictatorial means against the authors. Yet, in certain respects, this reviewer would have welcomed stronger pressure in order to achieve an even larger degree of uniformity. In articles devoted to leading cases it would have been better had all authors limited themselves to give the facts and the decision. It seems superfluous that in addition thereto some authors indulge in speculations how the case would be decided were it to come up for decision today (e.g. *Fort-Fall*). Some authors, while dealing with topics under a general heading, were exclusively concerned with that topic in respect to Germany. Thus the heading "Occupation Regime after World War II" completely neglects the fact that for some time other countries, e.g. Japan, Italy, and Austria, were also under such regimes. The authors of the articles on the Arab Movement observed the bibliographical time limits so strictly, that they failed to mention the works of Colonel Lawrence. There exists a certain disparity concerning the headings of the various articles dealing with decisions by domestic or international tribunals. Such cases are quoted sometimes in English (e.g. "Chilean Peruvian Accounts Case") and sometimes in German e.g. *"Durchgangsrecht über indisches Gebiet-Fall"*). Decisions by English or United States sometimes appear under a heading like *"Bernstein* v. *Van Heyghen Frères Fall,"* sometimes even with a cross reference for the name of the defendant (which I deem rather redundant), while other cases are quoted in a more truncated form, e.g. *"Fibrosa-Fall."* Incidentally, in respect to this latter case there is a cross reference under the heading *"Hugh Stevenson and Sons-Fall,"* although the article on *Fibrosa* does not mention this case. The third (final) volume of the new edition will contain not only a case index but also an index according to topics, which will list the topics, under their French and English names, thus facilitating the use of the work for persons not completely familiar with the German language. To a certain extent this will remedy an omission which appears rather regrettable to the present reviewer. The topics dealing with the several international organizations are headed by their full name translated into German, e.g. *"Allgemeines Zoll- und Handelsabkommen von 1947,"* which is unfamiliar even to German students, who more likely would look for information on that topic under the English abbreviation of the name, i.e. GATT. At least, there should be a heading "GATT" referring the reader back to the article concerned.

IGNAZ SEIDL-HOHENVELDERN

CLIFFORD-VAUGHAN, F. *A Selective Bibliography of Works on International Law.* London-Paris, 1960, Pp. xxxii and 50. Mimeographed.

Unusual economy of space, and avoidance of unnecessary detail, permit our author to include in his bibliography an impressive number of works from the field of international law, representing contributions in English, French, Italian, German, Spanish, Portuguese, Polish, and Russian. As the author explains, articles appearing in periodicals are not included, with the exception of four serials which fall into the category of collections of monographic

works: *Recueil des Cours de l' Academie de Droit International, The British Yearbook of International Law, The Procedings of the Grotius Society,* and the *Yearbook of World Affairs.* However, the bibliography does include a list of the more important periodicals, and a few items could be added to this list. It should be pointed out that the English title of the *Miezhdunarodnaja Zizn* (or Zhizn), published in Moscow, is *International Affairs* (the Soviets publish an English version).

The bibliography is introduced by a very useful scheme of subject classification. The writer of these lines does not claim—in spite of some library experience—to be an expert in this field, which has been developed by professionals into a fine art (according to some zealots of librarianship, into a scientific discipline), but the scheme appeals to him as being systematically valuable in terms of international law, which perhaps excuses its praise by a lawyer. It is followed by a guide to authors and index and a bibliography organized on the classification scheme.

The form of the publication suggests that it is a preliminary edition, and the reviewer wishes to encourage its compiler to arrange for its appearance in printed form.

KAZIMIERZ GRZYBOWSKI

BLIX, H. *Treaty Making Power.* London: Stevens & Sons Ltd. New York: Frederick A. Praeger, 1960. Pp. xviii, 414.

The present book by a Swedish author deals in a sober and well-documented fashion with all the problems connected with the treaty-making power in international law. Much has already been written on this subject; the present re-examination of most of the available material possesses nonetheless topical interest—and that not only in view of the fact that the International Law Commission devotes considerable efforts to the establishment of international law rules concerning treaties. In his book Blix underlines the changes in the way of life of the international community, which have taken place in our time. No doubt, the number of matters to be settled today by international agreements is far greater than fifty years ago, and such settlement is often a matter of some urgency. This has led to the habit of concluding an ever-growing number of such agreements "in simplified form," although such procedures are often not provided for in the constitutions of the countries concerned. Thus, the habit of taking liberties with such constitutional rules has certainly grown, which in turn raises the central problem dealt with by the author, to wit, what will be the consequences under international law if such constitutional rules are violated. Are treaties concluded in violation of such rules merely void or voidable under domestic law or also under international law? The author examines this problem very carefully in the light of British, Swedish, and United States law. He has, however, also analyzed a large proportion of the treaties published in the League of Nations and United Nations Treaty Series, in order to obtain statistical data. Yet, the problem is even vaster than shown by this material. The rules of the constitutions of most states concerning the conclusion of treaties are tampered with in the actual practice of diplomatic intercourse on a much larger scale than the guardians of such constitutions would imagine. In view of these "facts of life," the author is correctly critical of the theory which links the international validity of treaties to compliance of the treaty concerned with the rules on the conclusion of treaties figuring in the domestic law of the partners to such treaty. The test preferred by Blix is that of "apparent ability,"

i.e. a state will be bound internationally to its treaty partner, if the agent of the state concerned and/or that state itself appeared to be able to assume the commitment concerned, even where such appeareance does not correspond to the true construction of its constitutional rules concerning the conclusion of treaties. Blix himself is aware of the fact that, to a certain extent, he merely gives a new, and very well-chosen, name to a test, which had already been maintained by some other authors, e.g. Verdross, who, starting from the basis of the international importance of the constitutionality of treaties, arrived at the same result as Blix, by restricting to such a point the applicability of the principle basically advocated.

The book is of special interest for comparatists, as its subject-matter is only partly governed by international law. The author cannot do otherwise but examine and analyze the various rules of municipal law on treaty-making as well. He deals also with situations where the municipal regulation of the matter is likely to be nonexistent or inoperative. Thus, he examines the treaty-making power of revolutionary governments and of governments-in-exile. His very thorough researches on these two subjects are almost monographs on the general law of recognition and on the status of such governments. The author also examines the right and competence of foreign ministers and of diplomats to bind their state under international as well as under the several municipal laws. It is regrettable that the author did not extend his research to the decisions of courts of the German Federal Republic on the limits of the treaty-making power as well as to the scientific discussions concerning the topics of his book, which have been mainly concerned with the disputed validity of the Reichskonkordat with the Holy See Decision of the Federal Constitutional Court of March 26, 1957, BVerfG 6 (1957) 309, (366) and on the power of the Federal Chancellor to sign the EDG Treaty Federal Constitutional Court of May 15, 1952, BVerfG 1 (1952) 281 (283). Mosler, *Das Völkerrecht in der Praxis der deutschen Gerichte* (Karlsruhe 1957) and his Hague Academy lectures of 1957 would have been a good guide to this literature.

IGNAZ SEIDL-HOHENVELDERN

SASSE, H. *Der Weltpostverein.* Vol. XXXI, *Dokumente,* edited by the Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht of Hamburg University, by the Institut für Internationales Recht of Kiel University, and by the Institut für Völkerrecht of Göttingen University. Frankfurt/Main—Berlin: Alfred Metzner Verlag, 1959. Pp. 126.

The present volume contains the series of German translations of the constitutions and related documents of the several Specialized Agencies of the United Nations. The volume gives the French and German texts of the latest version of the Universal Postal Union (UPU) Convention, adopted at Ottawa on October 5, 1957; Part I of the Enabling Ordinance thereto as well as the agreements between the Universal Postal Union and the United Nations. The volume also contains a bibliography on the UPU as well as a list indicating where the earlier versions of the UPU Conventions and the Annexes thereto were published. A list of the member countries of UPU shows the dates of adhesion of the several countries to the different Special Agreements annexed to the UPU Convention.

Sasse has written a short introduction to the Convention, which will facilitate the reader in finding his way through this Convention which is a rather complicated document.

IGNAZ SEIDL-HOHENVELDERN

KARGER, A. *Steuerlich zweckmässige Testamente und Schenkungen.* Heidelberg/Berlin: Industrie—Verlag Carlheinz Gehlsen GmbH. vorm. Spaeth & Linde, 1960. Pp. 305.

This book is the first postwar edition of a handbook on inheritance and gift taxes which for over a quarter-century has enjoyed well-deserved popularity in Germany. It professes to be a "do-it-yourself" book for the educated layman, but its thorough treatment of the applicable provisions makes it a valuable help for any lawyer who has to deal with German assets or German beneficiaries in his estate planning work.

The author considers the problem from two points of view. First, he discusses in a systematic manner the statutory provisions on inheritance and gift taxes, valuation of assets and exemptions and deductions, as one would expect him to do in a short professional treatise on the subject. The second part of the book deals with some of the same problems in a practical manner, i.e. the author analyzes the application of the statutory provisions to the situation of a single person without near relatives, a married couple, persons with children, with dependent parents, etc. In this part, the author explains the effect of the various provisions with numerous examples and compares the advantages and disadvantages in each case of the different procedures permitted by law

In connection with the provisions on inheritance taxes, the book deals summarily with the general field of form of wills and legally effective testamentary provisions under German law. There is also a brief discussion of the new German marital property system which has changed substantially the German law of wills and distribution. A discussion of the treatment of *inter vivos* gifts in the German revenue laws, recommended forms of testamentary provisions, and excerpts from the applicable statutes complete the contents of the book.

The above-mentioned second part is of special importance to the foreign lawyer who might have a theoretical knowledge of the differences between the laws of wills and distribution in the Common and Civil law systems (such as forced heirship, universal succession by the "heir," inheritance as distinguished from estate taxes, payment of the tax by the beneficiary, etc.) and yet may not be fully aware of the manner in which these foreign legal institutions are applied and how they might affect the problem he is dealing with. The book, however, is essentially written with the planning of a German estate in mind. Provisions applicable to foreign estates having assets in Germany or beneficiaries who are residents of Germany are discussed only incidentally and not as fully as the American practitioner might desire. Nevertheless, any attorney whose practice requires consideration of these problems will find the book an invaluable help.

MICHAEL A. SCHWIND

JESSUP, PH. C.—TAUBENFELD, H. J. *Controls for Outer Space and the Antarctic Analogy.* New York: Columbia University Press, 1959. Pp. xi, 379.

This book contains more than its title suggests. The authors surveyed all forms of international controls hitherto used, always with an eye on the possibilities of employing such methods with regard to Outer Space. The first part of the volume deals with attempts of international control of territories in various forms. One of the forms of such control is the establishment of a condominium. It may be interesting for the comparatist that the list given by the authors could possibly be enlarged by an additional case. Accord-

ing to a theory, which is, however, rather controversial, the area of Lake Constance forms a condominium of the riparian States.

In the subsequent chapters, the authors examine the possibility of extending the jurisdiction of existing international organization like ICAO or ITU to activities in Outer Space followed by a very complete and highly interesting survey of the political, strategic, economic, and legal problems arising in Antarctica. Obviously, future Space explorers will be confronted by physical conditions somewhat similar to those which rendered and render doubtful any claims to adquisition of permanent sovereignty over Antarctica. Nonetheless, in the case of Antarctica such claims do already exist. They constitute a major obstacle for any attempt to establish an effective international administration of the area, desirable as such administration would be from other points of view. It must be considered already as a major success that the Antarctic Treaty of December 1, 1959, did at least "freeze" all such claims. The authors suggest that in the case of Outer Space any such claims should be waived before the actual presenting of such claims should become possible, e.g. the claim to landing a party on a celestial body.

It is only in the last 90 pages that the authors discuss the problems of Outer Space as such. The reader should be grateful that he is neither confronted with "science fiction," nor with what this reviewer would call "political-science fiction." The authors do not hide their sympathy for the establishment of international controls for Outer Space, if possible under the auspices of the United Nations, but they do not harbor dreams of world government. They rightly regret this but they take account of the fact that very likely the tensions and conflicts existing on Earth will be projected into Outer Space. As far as they venture forth into the future, they discuss the effects of possible technological developments on the legal and political problems involved. Lawyers will be grateful that they are spared detailed discussion of physical and astronautical data, although such data have obviously carefully been considered by the authors before writing this chapter. The authors state simply, that if such and such a technical aim will be achieved this will have such and such consequences in the political and legal field. And this is all that the lawyer cares to know. As a conclusion of their research, the authors make a sober plea for international control of all Space activities. This plea is all the more convincing as it is not based on enthusiastic intuition but on a sound and sober appreciation of the political facts of life of to-day.

This reviewer would like to add a footnote to this review concerning the United States custom of printing footnotes at the end of the volume and not under the text, to which he has repeatedly stated his aversion, and would now like to suggest a construction proposal. There are footnotes and footnotes. Some contain merely a reference to a work where a certain quotation was taken from. These are of no interest to the general reader. In other footnotes, however, an author discusses divergent opinions or gives some interesting factual information, which, for one reason or another, could not be inserted in the text. Of these footnotes, the general reader would like to take notice. Therefore, if the tedious habit of putting footnotes at the end of the volume cannot be changed, would it not be possible to permit the reader to distinguish somehow between these two kinds of footnotes, e.g., by marking the latter by an asterisk? If even this would be asking too much, why could footnotes not be numbered

currently without interruption according to chapters? Even this would facilitate the task of the reader.

IGNAZ SEIDL-HOHENVELDERN

DAS, S. K. *Japanese Occupation and Ex Post Facto Legislation in Malaya.* Foreword by the Hon. Dato' Sir James Thomson, P.M.N., P.J.K. Singapore: Malayan Law Journal, 1960. Pp. xiv, 148.

Comparatists are always eager to discover new fields where to practice their art. The present author has devoted at least part of his work to a comparative study of a topic, which hitherto had not been the subject of much comparative research, in the borderline area, where international law is applied in close connection with rules stemming from the internal law of the country concerned. He tries to deal with such subjects as trading with the enemy, the effect of war on contracts, collaboration, war crimes, the validity of acts of an occupant and *post-liminium,* also from a comparative angle. This opens up interesting vistas of a legal and sociological nature. It is astonishing to see how similar were the problems which countries had to face after World War II, even down to such details as the reluctance of resistance movements to submit to the re-established legal government of the country concerned. Of course, the author deals mainly with the situation and legal problems which arose in Malaya, where matters were further complicated by the fact that the end of the Japanese occupation did not coincide with the acquisition of independence. The pertinent rules of the law before and after the Japanese occupation are dealt with in great detail, almost too much so in the eyes of a foreign reader, who will not readily have access to the texts commented upon. The great lines of the arguments of the author are therefore sometimes submerged by a wealth of details of minor importance. The author must nonetheless be congratulated upon having made accessible to a larger public the special problems created by the events of World War II in Malaya as well as the solutions thereof, which deserve to become more generally known.

IGNAZ SEIDL-HOHENVELDERN

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*Mention in this list does not preclude a later review*

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# Bulletin

*Special Editor:* KURT H. NADELMANN
American Foreign Law Association

## REPORTS

AMERICAN FOREIGN LAW ASSOCIATION—The annual meeting of the American Foreign Law Association, Inc., was held in New York City at the House of the Association of the Bar of the City of New York on April 14, 1961. Mr. Alexis C. Coudert, President of the Association, was in the Chair. At the business meeting, the officers of the Association presented their respective reports. The report of the President is reproduced below. The following were elected as Directors of the Class of 1964: Miguel A. de Capriles, David E. Grant, John N. Hazard, Kurt H. Nadelmann.

A Nominating Committee was elected composed of Messrs. Albert M. Herrmann, Willis L. M. Reese, Otto C. Sommerich, Joseph M. Sweeney, Arthur von Mehren.

Professor Hessel E. Yntema was designated as an Honorary Member of the Association for life.

At the annual meeting of the Board of Directors held immediately following the membership meeting, the following were elected as officers of the Association: President—Alexis C. Coudert; Vice Presidents—George J. Eder, W. Harvey Reeves, Arthur von Mehren, Hessel E. Yntema; Treasurer—Leon H. Doman; Secretary—A. Edward Gottesman, 488 Madison Avenue, New York 27, N. Y.

ALBERT M. HERRMANN,
ACTING SECRETARY

### PRESIDENTIAL REPORT

This report covers briefly our activities since our last annual meeting held in New York, March 25–26, 1960.

The proceedings of the last annual meeting were published in the American Journal of Comparative Law, Vol. 9, pages 235 to 273 (1960). You will recall that the business meeting and banquet took place at the United Nations building, followed the next day in this building by the presentation of eleven reports on the topic, "Current Problems and Possibilities of Co-ordinating Legal Systems to Facilitate International Intercourse."

We have made efforts to increase our membership, and during the past business year 54 new members were admitted. We have maintained our close contact with the American Association for the Comparative Study of Law, Inc., and the American Journal of Comparative Law, published by that Association.

We have continued the practice of holding luncheon meetings at which reports were presented by lawyers and jurists and discussed by the attending members. These reports were then mimeographed and distributed to our entire membership. They represent a valuable contribution to the study of various topics of interest to the profession. The following reports were presented at the luncheon meetings: Prof. Arthur Larson (Duke University): The International Rule of Law; James N. Hyde, attorney, New York, and Prof. Edward D. Re (St. John's University, School of Law): The Act of State Doctrine, a Reappraisal; George Nebolsine, attorney, New York: Antitrust Problems and the Common Market; Leonard B. Boudin, attorney, New York: Loss of Nationality.

Our 1961 annual meeting, reported elsewhere in this issue, which was co-sponsored by the American Association for the Comparative Study of Law, Inc., included reports by a distinguished panel on "The Impact of Independence on the Development of Private Law in the New African Nations." We invited to the meeting, as Guests of Honor, the permanent representatives and ambassadors to the United Nations of the African nations. The other topic on the agenda dealt with certain aspects of international civil procedure. We also witnessed presentation to our distinguished member, Professor Hessel E. Yntema, of a *de luxe* copy of the remarkable book, entitled, "XXth Century Comparative and Conflicts Law," a series of essays by eminent jurists of various countries dedicated to Professor Yntema.

Our Association has continued to act as the American Representative to the International Association of Legal Science (IALS). Our delegate is Professor Yntema. We have acted as co-sponsors of several meetings and institutes organized in various places in the United States. Officers and members of the Board of Directors had as luncheon guests distinguished vistors. At one of such luncheons, arranged by Mr. Otto C. Sommerich, the guest of honor, Mr. E. K. Dadzie, Head of the Legal Division and Legal Adviser of the Ministry of Foreign Affairs, Ghana, gave an outline of the legal system prevailing in Ghana.

ALEXIS C. COUDERT

AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION—The 40th Annual Meeting of the American Branch of the International Law Association was held in New York City on May 5 and 6, 1961. On the first day, a Panel Discussion was held on "Recent Trends and Developments in the Law of Sovereign Immunity." Members of the Panel were Nicholas R. Doman, New York, Chairman, Sigmund Timberg, Washington, D. C., William L. Griffin, Office of the Legal Adviser, Department of State. The guest speaker at the banquet was Andrew W. Cordier, Executive Assistant to the Secretary General of the United Nations. At the business meeting, interim reports were received from the chairmen of the Branch committees. Announcement was made of the preliminary plans of the Association for the next Conference, to be held in Brussels in 1962. The Officers of the Branch were re-elected for another year.

AMERICAN SOCIETY OF INTERNATIONAL LAW—The fifty-fifth annual meeting of the American Society of International Law, held in Washington, D. C. April 27 to 29, 1961, has been noteworthy. For the first time the Society had at its disposal its own home, "Tillar House," located on Sheridan Circle at 2223 Massachusetts Avenue, Washington 8, D. C. It had the services of an Executive Director, a newly created position, and it was in position to announce plans for expanded activity, especially in the field of research, thanks to material support given by foundations and members. The practice of having a special session on Teaching of International Law was revived, and the program showed a good blend of topics from the fields of international law, conflict of laws, and the law of international organizations. Round-tables were on: Sovereignty and International Responsibility, 1960: The Caribbeans and the Congo; Arbitration between Governments and Foreign Private Firms; Constitutional Development of the United Nations; Current Developments in the Law of Sovereign Immunity; Africa: The Problems of the New States; Developments in Air Space and Outer Space.

NEW YORK REGIONAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW—At a Regional Meeting of the American Society of International Law in New York City on March 2, 1961, on "Economic Development and For-

eign Investment: The Rule of Law," at which Mr. James N. Hyde presided, Mr. Frank M. Coffin, Managing Director of the Development Loan Fund, outlined the role which the Fund expects to play in providing loan capital for economic development in underdeveloped countries and indicated the assistance which it is prepared to give in supporting private investment.

During the panel discussion, Mr. John R. Stevenson, of the New York Bar, expressed concern that too great emphasis on government financing would discourage interest in developing principles of international law on which investors could rely, as opposed to governmental guarantees. Professor Friedmann, of Columbia University, contended that unless the West is to be ignominiously defeated in economic development governmental assistance is essential. It is also essential, he said, to avoid imposing on underdeveloped countries traditional standards regarding the roles of public and private enterprise; nor should Western lawyers exaggerate the abstract importance of the international standard in the protection of investments.

Professor Sohn of Harvard affirmed the existence of an international standard. Should this now be changed? The international community is interested in clear, generally accepted standards, impartially applied by impartial tribunals. If underdeveloped countries do not accept them, they will less likely benefit from private foreign investments. Deputy U.N. representative Castañeda of Mexico conceded that probably international decisions are weighted in favor of a minimum international standard, but it is not always easy to ascertain what this standard is in relation to property rights. Underdeveloped countries tend to feel that the concept results from the practice of industrialized nations in their relations with underdeveloped countries, in situations of great inequality. He favored the thesis of a Community of Fortunes. When a foreigner settles in a country, he casts his lot with the people there, as in a marriage, for better and for worse. He should not claim greater rights than they have. Mr. I. N. P. Stokes, of the New York Bar, commented that all would agree there must be at least national treatment. In the procedural field there is substantial agreement on an international standard below which alien treatment must not fall. There is less agreement on substantive law, particularly when applied to economic interests. He questioned whether a state could without violating international law take alien property without paying full value or could breach alien contracts without affording remedies. He also questioned whether a state can insist that its remedies are conclusive.

Messrs. Sohn and Stevenson felt that the establishment of effective international tribunals would go far to define the international standard. Repeal of the Connally amendment was also emphasized as an essential step. Mr. Coffin agreed that a legal framework and a greater respect for law are essential. He was not certain, however, whether law creates the climate for investment or whether the climate for investment creates the law.

G. W. HAIGHT

CONFERENCE ON THE LAWYER'S ROLE IN INTERNATIONAL TRADE—More than 350 lawyers, businessmen, and students attended the first student-directed conference on "The Lawyer's Role in International Trade" at the Yale Law School on March 3 and 4, 1961. Reflecting the rapidly increasing interest of law students in international legal affairs, the World Community Association, a Yale Law School student organization which has become the student center of international activities at the School, was host to the gathering. The conference was co-sponsored by the Yale Law School, the International and Comparative Law Section of the American Bar Association, the American Society of International Law, the Committee on Foreign Law of the Association of the

Bar of the City of New York, and the international law clubs at Columbia, Harvard, and University of Virginia Law Schools.

Mark S. Massel of the Brookings Institution, Washington, D.C., keynoted the discussion in emphasizing the importance of related non-legal disciplines in coping with the constantly changing problems in the international trade field. Participants then attended follow-up seminars of Trade. William J. Barnhard, attorney, Washington, D.C., discussed "The Legal Problems of Exporting and Importing in the '60's." James G. Johnson, Jr., attorney, New York City, discussed "Problems of Organizing for Overseas Operation," and Professor Stanley D. Metzger of Georgetown University analyzed United States trade policy as the challenge of the 1960's.

A second address, "International Commerce and Anti-Trust Law," by Professor Corwin D. Edwards of the University of Chicago, was followed by seminars on Anti-Trust problems: "Anti-Trust Provisions of the Rome Treaty" by Dean Eugene V. Rostow of the Yale Law School; "The Effect of the European Common Market on Patent and Anti-Trust Law" by Sigmund Timberg, Washington attorney; and "American Anti-Trust Problems in Foreign Operations" by G. W. Haight, Legal Advisor to the Royal Dutch Shell Group Companies in New York. Professor Richard N. Gardner of Columbia University surveyed the "United States Trade and Aid Policies for the 1960's."

The first address on the second day, "The Legal Aspects of Developing Regional Overseas Markets," was delivered by Professor Eric Stein of the University of Michigan. Two of the follow-up seminars on Regional Markets were conducted by Professor Bayless A. Manning and Leon Lipson of Yale Law School, who discussed the Latin-American Market and Soviet Trade. Martin Domke, vice president of the American Arbitration Association, conducted his seminar on "The Settlement of Trade Disputes in Regional Markets," and George W. Ray, General Counsel of the Arabian American Oil Company, surveyed "Recent Developments in Middle Eastern Oil Operations."

In the afternoon, Representative Hale Boggs, chairman of the House Subcommittee on Administration of Foreign Trade Laws and Policy, examined "The Taxation of Private Foreign Investment." Taxation seminars on "Current Issues in the Taxation of Foreign Income" by Professor Boris I. Bittner of Yale Law School and David R. Tillinghast, New York attorney, "Tax Treaties between Industrial and Unindustrialized Nations" by Matthew J. Kust, Washington attorney, and "Tax Aspects of Organizing International Operations," by Walter A. Slowinski, Washington attorney, concluded the daytime sessions. Professor Raymond Vernon of the Harvard Business School in the final address surveyed future trade developments and emphasized the need for increasing co-operation between private business and government.

EDWARD TERHUNE MILLER

BOGOTA CONFERENCE OF THE INTER-AMERICAN BAR ASSOCIATION—The XIIth Conference of the Inter-American Bar Association was held in Bogota, Colombia, from January 27 to February 3, 1961, at the Javeriana University. Some 400 lawyers from nearly every nation of the Hemisphere, including Argentina and Canada, attended. The president of Colombia, Dr. Alberto Lleras Camargo, addressed the opening session. Robert G. Storey, past president of the Association, read a message from Whitney North Seymour, president of the American Bar Association. Mauricio Mackenzie, president of the Association, reported on the progress of the organization. Other speakers were Dr. Mauricio A. Ottolenghi, chairman of the Executive Committee, William Roy Vallance, secretary general, and Charles R. Norberg, assistant treasurer.

Approximately 75 papers were presented at the Conference. A series of

resolutions were adopted which will be published in due course.

Receptions were given by the President of Colombia at the Presidential Palace, the Chief Justice and the Associate Justices of the Supreme Court of Colombia, the Mayor of Bogota, the Minister of Justice, the Club de Abogados, Dr. Camilo de Brigard Silva, and Dr. Eduardo Zuleta Angel, distinguished Colombian lawyers who were founders of the Association, and the Chargé d'affaires of the American Embassy.

Jonathan E. Ammerman, of Miami, Florida, was awarded the Association's Gold Medal in recognition of his work as chairman of the Organizing Committee for the XIth Conference. Dr. Haroldo Valladão, of Rio de Janeiro, member of the Council, was awarded the Association's first Medal for outstanding contributions to the development of international law in the Western Hemisphere and the advancement of the work of the Association. Dr. Eduardo Jiménez de Aréchaga, of Montevideo, Uruguay, was given the Association's Book Award for his book, entitled, "Derecho Constitucional de las Naciones Unidas."

Panama was chosen as the site for the XIIIth Conference.

MADRID SESSION OF THE INTERNATIONAL ASSOCIATION FOR THE TEACHING OF COMPARATIVE LAW—Under the presidency of Dean G. Marty of Toulouse and the deanship of Prof. Rodière and the vice deanship of Prof. de Solā Cañizares, the International Association for the Teaching of Comparative Law held its first session from March 20 to April 22, 1961, at the University of Madrid. As both the administrative staff and faculty had previously been associated with the International Faculty of Comparative Law in Luxembourg, the session took the already familiar form of courses on the major systems of law for first year students; more specialized courses in public and private law for second year students and highly specialized courses in public liberties, criminal law, merger of corporations, immovable property, and stability of employment for third year students. Each of the latter subjects was treated from the point of view of the law of six or seven countries.

Forty-five professors from 15 countries constituted the faculty, while there were 136 students in the first year, 54 students in the second year and 30 students in the third year, all students having completed their legal education in their home countries. Students came from all continents, the preponderance being from Western Europe, although Eastern Europe jurists co-operated as they had with the Luxembourg faculty in presenting courses and in sending students. Several students came from both the former English and French colonies in Africa. Most students received scholarships from their own governments or Universities, and some from the International Association.

As in the past an active program of student events lightened the burden of intensive study, and week-end excursions introduced faculty and students to the glories of ancient Spain.

JOHN N. HAZARD

## VARIA

MIAMI PROGRAM FOR CUBAN REFUGEE LAWYERS—The University of Miami School of Law is currently conducting a special tuition-free nine month program for Cuban refugee lawyers, which will run from February 27 to December 23, 1961. The nine month course, a survey of United States law, will embrace most of the traditional categories of the law school curricula. Successful completion will lead to award of a certificate. The lectures are being given by members of the University of Miami Law Faculty and Dade County practitioners. Provision has been made for simultaneous translation of the lectures into Spanish, and the students are provided with basic reading materials in Spanish and English.

JOHN C. CHOMMIE

CANADIAN ASSOCIATION OF COMPARATIVE LAW—The March 1961 issue of the Canadian Bar Review/Revue du Barreau Canadien carries a notice on formation of the "Canadian Association of Comparative Law." Justice Judson of the Supreme Court of Canada has become the first president of the Association; Professor J.-G. Castel of Osgoode Hall Law School is secretary-treasurer.

## IN MEMORIAM

ARNOLD W. KNAUTH—Arnold W. Knauth, who died in New York on October 14, 1960, at the age of 69, had a long and varied career. He practiced admiralty with Haight, Griffin & Deming, then during World War II served as Senior Admiralty Counsel to the United States Department of Justice and later as a partner in the firm of Lowenstein, Pitcher, Spence, Hotchkiss, Amann & Parr. He published an excellent book on ocean bills of lading and edited an edition of Griffin on Collision and on the practice side edited two editions of Benedict on Admiralty, keeping it up-to-date. He was a frequent contributor to law reviews. He also published in 1957 the only existing collection of maritime conventions. In 1923 he founded American Maritime Cases and was an editor until the time of his death. In 1928 he founded United States Aviation Cases, of which he also remained an editor until the time of his death. In 1932 he became a professor of law at New York University and taught aviation and admiralty law there until his death. From 1936 to 1946 he was permanent United States member of the CITEJA and attended as representative of the United States at a number of conferences of that body. His last work was as chairman of the committee of the International Law Association on international rivers, a work which he brought to a very happy fruition in Hamburg in 1960. In recognition of his knowledge of admiralty and air law, he lectured in Pakistan, India, and Argentina as the guest of various universities. A final tribute was his appointment in 1960, shortly before his death, to the Committee on Admiralty Rules of Practice of the Judicial Council of the United States.

He was always a man of vision, building for the future of law. He recognized the need of assembling admiralty decisions, treaties, and texts in a single set of reports, which included not only the American decisions but foreign decisions of importance that were not otherwise available in this country, except by accident. He also foresaw the need of similar concentration of the aviation cases, laws, and regulations which otherwise are scattered over more than 50 series of law reports. In his books, he kept the admiralty and aviation law up-to-date.

In his earlier days, some thought him dictatorial but in his later years, particularly in connection with the intricate problems of international rivers, he became the ablest of conciliators at the conferences both in New York and Hamburg of the International Law Association. He was able to preside over committees representing completely discordant views on the subject and, by graceful and reasonable handling, produce a unanimous set of principles which has already contributed to the settlement of a number of dangerous international controversies.

OSCAR R. HOUSTON

VLADIMIR GSOVSKI—The death of Dr. Vladimir Gsovski, Chief of the European Law Division of the Law Library, Library of Congress, is a serious loss to the worldwide community of scholars engaged in the study of comparative law. His chief interest was in the field of Soviet law, and his writings on various aspects of the Soviet legal system gained him an international reputation.

Dr. Gsovski's intellectual makeup, which established him as an expert in Soviet law, represents a phenomenon which is slowly disappearing from the realm of legal scholarship in the Free World. He belonged to that dwindling group of Russian scholars whose roots

were still deep in pre-revolutionary Russia, and who, as mature men, witnessed the growth of the Soviet order, a bitter disappointment to their hopes for the future of their country.

Born in 1891 in Moscow, the ancient capital of Russia, Dr. Gsovski completed his legal studies at the law school of the University of his native city. His education was broadened by a year at the University of Heidelberg in Germany, which, before World War I, was the Mecca for many Russian jurists who sought to widen their horizons at that famous place of learning. He embarked on his legal career in prerevolutionary Russia and began to gather the experiences and impressions which make the mind of a legal scholar.

The fact that in his formative years he was exposed to the method of legal thinking which was to become the main tool of his trade in his later years was important in the perspective of Dr. Gsovski's life achievements. Legal instruction in the universities of Russia featured a broad comparative background, emphasizing the trends and growth of law in the West of Europe. The beginnings of legal reform in Russia were drawn from French models, and the professors of law who taught in the universities of prerevolutionary Russia were bent on familiarizing their students with the concepts and institutions of modern European law.

This approach was dictated by the keen sense of dissatisfaction of the legal profession with the state of the Russian legal system. While a good deal was done after the judicial reform in the 1860's, the reform was far from complete, both as regards civil law proper and the institutions of public law and the general governmental and administrative regime of the country. In this situation, Russian lawyers turned their eyes to the West in a search for models for the future laws of Russia. It was this type of academic curriculum which shaped the mind of the future Chief of the European Law Division of the Library of Congress. This atmosphere in the Russian universities formed the minds of not only those who went into exile, but also those who undertook, as Marxist lawyers, to shape the institutions of Soviet law. Close familiarity with the atmosphere in which they grew together permitted Dr. Gsovski to draw a full picture of their ideas and their abandonment of the ideals which they once shared.

Dr. Gsovski's graduation from the University of Moscow coincided with the outbreak of World War I, and shortly afterwards he was called to the army where he served as an artillery officer, fighting with distinction against the armies of the Central Powers. He was seriously wounded and when barely recovered was involved in the revolutionary turmoil. He finally joined the White armies in the south, sharing with them evacuation and exile, which separated him for the rest of his life from his native land.

However hard were the beginnings of life for the young and unknown scholar on foreign soil, his legal career in Yugoslavia, and later in Czechoslovakia, added another aspect to his experience. His work in the Yugoslav administration of justice, and later in the courts of the Subcarpathian Ukraine, which after World War I became a part of Czechoslovakia, broadened his knowledge of the European legal systems, including the laws of the Balkan and of Eastern and Central Europe, adding to his already prodigious linguistic abilities. In the service of the Czechoslovak administration of justice, Vladimir Gsovski took his first steps as an author in the field of comparative law by publishing translations of Hungarian laws for the use of Czechoslovak courts in Subcarpathian Ukraine, where Russian was the official language.

The most important phase in Vladimir Gsovski's scholarly life began with his appointment to the Law Library of the Library of Congress as a specialist in foreign law. His tenure of office coincided with an energetic drive to expand the foreign law collections of the Library of Congress, in which both

his legal education and his linguistic ability were extremely useful. As a result of his efforts, the foreign law collections in the Library of Congress were greatly enlarged, in size and completeness permitting meaningful research in any phase of European law. His special pride was the collection of Russian law books, both prerevolutionary and Soviet, which is one of the richest in the West. Its value is greatly enhanced by the holdings of books from neighboring countries, which Dr. Gsovski worked with equal vigor to expand, a contribution of singular importance in view of the present political situation in Eastern Europe.

As the years went by, even before World War II, and to a greater extent after the War, interest in Soviet affairs began to grow and lead to the study of Soviet legal institutions. After World War II, a series of articles and monographs, culminating in a two-volume study of Soviet Civil Law, established Vladimir Gsovski's reputation as an expert in this field. In 1949, he assumed the direction of the Mid-European Law Project, which under him developed into an important center for the study of comparative law, and in particular of the laws of that part of Europe which fell under the Soviet sphere of influence.

Vladimir Gsovski brought to the study of Soviet law great familiarity with European jurisprudence combined with a deep awareness of all things Russian. He firmly believed that legal order must rest on the recognition of individual rights. This traditional *point d'appui* was the basis for his criticism of the Soviet legal system. He was highly critical of any theoretical construction which departed from the concept of right, and which instead emphasized the idea of relation or function.

This reflection is introduced to emphasize the nature of the departed master's contribution to the study of Soviet law. His approach was extremely useful, and at the inception of Soviet legal studies the only practical one, as the Soviet legal system developed its institutions through the distortion of traditional concepts. While today this approach would no longer give a full scope of vision into the intricacies of the Soviet legal order, Dr. Gsovski's works, for a long time to come, will serve as guides to the study of socialist law, and as masterly models of research for the new generations of scholars.

KAZIMIERZ GRZYBOWSKI

## AMERICAN FOREIGN LAW ASSOCIATION

Organized in New York on February 24, 1925, and incorporated under the Membership Corporations Law of the State of New York since April 10, 1959, the American Foreign Law Association has as its objectives: to advance learning by promoting the study, understanding, and practice of foreign, comparative and private international law and the diffusion of knowledge with respect thereto; and to engage in active co-operation with other learned societies in the United States and abroad devoted to the subjects mentioned and to foster legal research and cause to be published and distributed works in the fields of law mentioned.

The Association, which has a branch in Chicago, is the United States national committee of the International Association of Legal Science.

Active membership in the Association is open to any person of good moral character who is a member of the Bar, a teacher of law, or who has manifested a special interest in the objects of the Association.

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# Proceedings

## PROCEEDINGS OF THE 1961 ANNUAL MEETING OF THE AMERICAN FOREIGN LAW ASSOCIATION

The Annual Meeting of the American Foreign Law Association was held on April 14, 1961 in New York at the House of the Association of the Bar of the City of New York. Preceding the business meeting, reported elsewhere in this issue, discussion sessions, sponsored jointly by the Association and the American Association for the Comparative Study of Law, were held on the subjects indicated below.

### PART I

### THE IMPACT OF INDEPENDENCE OF THE DEVELOPMENT OF PRIVATE LAW IN THE NEW AFRICAN NATIONS

The president of the American Foreign Law Association, Mr. Alexis C. Coudert, who was in the chair, welcomed members and guests and introduced diplomatic representatives from various African nations who were present. He then discussed the general theme of this part of the meeting and presented the members of the Panel and the Moderator, Professor Arthur Schiller, of Columbia University. Papers were read by the following members of the Panel: His Excellency Mr. Louis Ignacio Pinto, Ambassador and Permanent Representative of Dahomey to the United Nations; His Excellency Mr. Konan Bédié, Ambassador of the Republic of Ivory Coast to the United States; Boco E. Eyo, Barrister at Law, Nigeria; Mansur Khalid, Advocate, Sudan. After presentation of the papers, the Moderator commented upon some of the problems faced by the new African nations in adapting their law to new conditions.

#### The Judicial System of the Republic of Ivory Coast

*Konan Bédié*

I have no doubt that you are familiar with the fact that my country is a very young one, as the Ivory Coast proclaimed its independence a little less than eight months ago, or to be more precise—and I believe that legal minds have to be that way—this most memorable event in the long history of our land occurred on August 7 of last year. But I am somewhat less sure that you are aware that our Attorney General is considerably older than his American colleague, who fills the same high office in Washington, D.C. Truly, Monsieur Alphonse Boni, who aims, in co-operation with our Chief of State, President Felix Houphouet-Boigny, and the other cabinet members in Abidjan, to provide the Ivory Coast with modern legislation, taking into account local contingencies, which would place our country on an equal footing with the great organized nations of the world, our Mr. Boni has passed the half century mark.

From the first days of our independence, as a matter of fact even before it had been officially achieved, our legal experts undertook the task of put-

ting together important juridical texts. Allow me to tell you, at the risk of displaying a lack of modesty, that already today the Ivory Coast is, in this field, leading the new French-speaking African Nations, some of which have contacted our juridical experts to get inspiration for their countries from the texts which we have worked out.

One of those texts is the Code of Criminal Procedure, which became the first document of its kind in decolonized Africa, when it was voted upon on October 28 of last year. The main trends which influenced its contents are a spirit of modernization and adaptation, along with the necessity of promoting prompt justice.

Among the other important texts being currently prepared—and some are already at a very advanced stage—one should mention: the law dealing with the Organization and Functioning of the Supreme Court, the law on the status of the magistracy, the law concerning judicial organization, and one on the organization and the functioning of the Supreme Council of Magistracy. Almost completed is a Code of Civil Procedure, which will be another first in our part of Africa, and a Criminal Code.

Along with establishing these new texts, our Ministry of Justice is also currently engaged in a wide and very thorough survey for the purpose of making a synthesis of all the customs within our country. We hope, in this way, to be able to determine the extent to which these customs might be modernized in order to be possibly used as a basis for a modern and singular Civil Rights system, applicable to everyone. This Civil Rights system will be the foundation on which we shall be able in a fairly near future to establish a Code of Common Law for the Ivory Coast.

I would like to stress most emphatically the fact that be it in the field of establishing all of these texts, or in the realm of the organization of our courts, we are led first of all by a desire to make justice more accessible, more rapid, more efficient.

And I am sure that you will not be surprised in the least to learn that, in order to make justice more accessible, we have started by simplifying and sometimes even abolishing quite a few formalities.

No means have been neglected to accelerate procedures. It was decided to impose very short terms on judicial authorities, as well as litigants. In order to discourage certain maneuvers of unscrupulous individuals—and such men may be occasionally found in any country—penalties have been provided for judicial officials who might be found guilty of negligence or of deliberately delaying procedures. In certain cases, these officials may even be removed from office.

The magistrates will be entrusted with the task of keeping a close watch in this field to insure that no citizen of the Ivory Coast having recourse to justice is denied his legitimate rights.

Special attention has been paid to make justice more efficient. Thus, the new Code of Criminal Procedure has introduced a new procedure for collecting fines, which, as anywhere else, is the most frequently applied penalty. We have regulated in minutest details the payment of judicial costs. Among the new elements in the functioning of justice, I would like to mention the establishment of a prison camp in Bouaké, the second largest city of our

country, which is suited for this purpose because of its location in the center of the Ivory Coast. We have also proceeded with the establishment of a body of prison guards. Simultaneously, we did not fail to introduce certain procedures in the common law field to ensure the enforcement of common law judgments.

Whatever the worth of measures provided in the realm of justice might be, as in any other field the caliber of the men who will apply them is of prime importance. Aware of this truism, which has been valid since the beginnings of this world, our Minister of Justice, while engrossed in the task of providing the Ivory Coast with a modern, rapid, and efficient justice, has concerned himself with putting at the service of this justice, competent, conscientious judges and with making sure that there are enough of them.

I do not need to recall to this distinguished audience that more perhaps than in the case of any other body, magistrature requires from those who enter into it technical knowledge as well as a calling. For one must indeed have a special calling to be able to pass judgment on his fellow men.

One of the aims of the government of the Ivory Coast is to Africanize the judiciary, just as we intend to do progressively in all administrative ranks of our country. But I would like to stress, that, especially in this connection, we do not intend to go ahead with Africanization at the expense of quality. Our primary consideration is to have men who are sufficiently prepared for the positions which they are to fill.

As of today, the judiciary of the Ivory Coast is composed of fifty magistrates, only two of whom are sons of the Ivory Coast. One of them is Deputy Public Prosecutor in our capital, Abidjan; the other one is an examining magistrate in that same city. Let us note that three other citizens of the Ivory Coast who were formerly in the magistrature are currently filling government positions in the executive branch.

Prospects for the Africanization of our judiciary are rather encouraging. As of now, thirty-eight court clerks and assistant clerks from the Ivory Coast are studying in France in the *magistrature* department of the Institute of Overseas Higher Studies, and fourteen others who are bachelors in law are in Paris at the National Center of Judicial Studies. Half of them—twenty-six or twenty-seven—will have finished their studies at those two schools this coming June and will return at once to the Ivory Coast. They will be immediately assigned to existing courts, where they will complete their practical studies while serving as deputies, judges, or examining magistrates.

In coming years, we expect to increase somewhat the number of yearly graduates from the two above-mentioned schools. On the other hand, taking into account the changes which are about to occur in our system of police-court-magistrates—changes on which I shall comment shortly—we envisage that we shall need in order to ensure the proper functioning of justice in the Ivory Coast a total strength of two hundred magistrates. Therefore, we hope —while sticking to realities—that in a fairly short time we shall attain this number of African magistrates. We are endeavering to shorten this period as much as possible by encouraging legal callings, especially by obtaining attractive living conditions for the young men who embark on this career.

With an eye for simplification and also in order to give to those who serve

Justice a feeling of belonging to one identical family, our government has, on the other hand, decided that there will be only one scale of magistrates.

They will be divided into three categories, depending on whether they are police-court magistrates, judges of county courts, or judges of courts of appeal. The judges will be recruited as follows: bachelors in law, graduated from the National Center of Judicial Studies, will start their career as judges of county courts. Our court clerks and assistant court clerks, who will have passed successfully the final examinations of the Institute of Overseas Higher Studies, will start out by being police-court magistrates. Later on, after a professional examination, they will be able to become County Court judges. From then on, exactly as their colleagues who have studied at the department of *magistrature* of the National Center, they will achieve promotion in the hierarchy, up to the Supreme Court, strictly on a merit basis.

One should not forget to mention that a great effort has been also made in my country for the recruiting of court clerks and assistant court clerks.

Another important task undertaken by our Ministry of Justice has been to establish a judicial system, which would be in accordance with the goals our government has set up for itself.

Our Constitution—and at this point I cannot resist mentioning to you that article number two states that the principle of our Republic is—"a government of the People for the People and by the People"—our Constitution has created a Supreme Court, which is the highest body for appeals. This Supreme Court is made up of four Chambers: the Constitutional Chamber, the Judicial Chamber, the Administrative Chamber, and the Chamber of Claims. Some of you, by the way, may have met our Chief Justice, appointed to this high position in January of this year, as Mr. Ernest Boka was twice in the United States last year. In the summer of 1960, while he was a cabinet member—the Minister of the Public Function—, he received an invitation from the United States Government to make a one-month study trip around this country. He returned to New York late last year as a member of our delegation to the first session of the current General Assembly of the United Nations.

Stepping down in the hierarchy of our judicial system, we find a Court of Appeals which existed already in the pre-independence period. Located in Abidjan, this Court of Appeals is staffed as follows: one Chief Judge; eight counselors; one public prosecutor; two Deputy Directors of Public Prosecution; two assistant public prosecutors; and eight assistant judges.

We have also kept the County Courts, one Upper, which meets in Abidjan, and two Lower located in the cities of Bouaké and of Gagnoa.

We have undertaken, however, an important innovation, namely the establishment of Police-Court magistrates, who will exercise their function in each of the newly created hundred administrative sub-divisions, our "*sous-préfectures.*" You must notice how anxious we have been to bring justice closer to the people, if you realize that in the past there were in the Ivory Coast only ten cities or townships, each having a Police Court. Each one of the new Police Courts will be headed by a magistrate. They will form a new jurisdiction and will be one of the pillars of the new system inasmuch as they will be called upon to replace the custom courts, which will be abol-

ished. In the judicial system field, as in all the others, we were inspired by the following principle: we do not want to turn our back on our past, of which we are proud, but we are aware, as has been recalled so often by the main architect of our independence, President Houphouet-Boigny, that we must always move forward and learn to adapt the framework of the past to the necessities of the present in order to build a future, which would provide a better lot for all sons of the Ivory Coast. From now on, all litigations will be settled in the first resort by the Police-Court magistrates, who will have the advantage of being experienced and independent men.

We shall start enacting this reform, involving the Police Courts, in the second part of this year. It is provided that one fifth of those magistrates, twenty of them, will sit on the bench by the end of this year.

As you see, we have endeavored to insure the unity of jurisprudence for all jurisdictions, starting with the Police Courts and going up through the judicial hierarchy, which is topped on one hand by the Court of Appeals and on the other by the Supreme Court.

Another innovation which deserves to be called to your attention, is that in the framework of our steady efforts to suit penalties to various breaches of the law, we have created jurisdictions for juvenile delinquents, which are entrusted to special judges, trained to deal with unfortunate adolescents.

I have attempted to give you a brief summary of all the judicial reforms which we have undertaken on the heels of our independence. Our main effort has centered upon endowing the courts of our country with competent and honest judges so that the population of the Ivory Coast might fully trust its Justice. For the government of a people requires a climate of confidence between those who govern and the governed. And a notable link of this chain of confidence is a serene, independent, competent, and efficient Justice. The political and economic stamina of the Nation depend thereon. This is true of any country regardless of the date of its emergence on the international scene. But it is possibly still more crucial for countries which have just achieved their independence. For—and I am quoting the words of our Chief of State, on the threshold of this year, the first year of our independence—"after the fight for emancipation, we have to start to win the hardest and the most thrilling of all struggles, the one which consists in building our young State."

I should be very happy if I have been able to give you an idea of what we are trying to build in the legal field, which is an important facet of our struggle.

## The Impact of English Law on Nigerian Private Law

*Boco E. Eyo*

My topic is "The impact of English law on Nigerian private law." I propose to present this Report in the following manner: Firstly, I shall outline in profile the present state of the law; secondly, I shall briefly indicate the method by which English law was introduced; thirdly, I shall consider both the specific and general impacts of English law on Nigerian private law; and fourthly, I shall, in summary, indicate the nature of the impact, and conclude with a consideration of the trend of a future legal development.

The legal system is a dual one. On the one hand, you have the English law; and on the other, the indigenous law and custom. There is a system of courts which traces its hierarchy to the Privy Council in London, that is to say, having it as its final court of appeal. This means that the country, though independent, still wishes to retain the association with, and the guidance of, the British sense of justice. A bench comprising of Nigerians in the following positions: Chief Justice of the Federation; Justices of Regional high courts, most of whom received their education at either Cambridge or Oxford University, and one of whom is a Doctor of Philosophy in law of London University; there are additionally many lower court Justices. The first Nigerian judge (the late Mr. Justice O. Jibowu) was appointed in 1931. Nigeria has presently a bar of some 800 members all of whom received their law training in England. The first Nigerian (Christopher A. Williams) was called to the bar at Inner Temple, London, in 1880, that is, 19 years after Nigeria came under British rule. Some of these lawyers are scholars in their own right; for instance, this reporter, when he was a student of the London School of Economics and Political Science, read law under a Nigerian lecturer at the School. The Federal Ministry of Justice is headed by a Nigerian whose various accomplishments include that of having sometime been a lecturer in law at Oxford University.

Some of the books on Nigerian law are, and have been written by Nigerians. Nigeria's Bar Association publishes a journal, though this is currently having its teething troubles, and a look at the Nigerian law reports indicates that much remains to be done in the field of law reporting.

The legal education in the country is patterned after that of the English, that is to say, (i) law school, catering for the professional training of practising lawyers: a law school is being planned to open in Lagos in the immediate future; and (ii) law faculty of a university, where law degrees can be obtained. Presently, there are to be two in the country: one at the University of Nigeria—a co-operative enterprise between the University of Michigan and the Government of Eastern Region of Nigeria—and the other at the University College of Ibadan.

In English constitutional theory, the mode of introducing English law into newly acquired territories varies according to the manner of their acquisition. Briefly, in settled colonies, for example, Lagos, the settlers were presumed to take with them as much of English law (namely, the common law of England, equity, and statutes of general application) as is suitable to the circumstances of the colony. In other cases, generally speaking, English law was introduced by express enactment made by the Crown by an Order-in-Council or in virtue of prerogative powers pursuant to the British Settlements Act, 1887, or the Foreign Jurisdiction Act, 1890 as repeatedly amended. Alternatively, English law may be introduced by the colonial legislature by means of legislation (namely, ordinances, proclamations, acts, etc.,) by virtue of powers granted to such legislatures by the Crown.

In the rest of the country, which consisted of Protectorates, Protected States, and Trust Territory, these last two methods were largely followed. A policy of respecting the indigenous law and its institutions was also observed.

As a result, apart from the fields of practice and evidence where the impact was great, English law operated (i) to modify the customary law, (ii) to fill the *casus omissus,* (iii) to adapt the law to its new role of ministering to new and changed conditions. We shall now turn our attention to these.

(i) *The Indigenous Courts*

Probably the first obvious feature to be noted is that the various traditional tribunals have been substantially adopted as instruments of legal administration by being recognized and reorganized by statute. In regard to the recognition and enforcement of the customary law, the following is a brief summary of the position: *The Supreme Court Ordinance,* s.19 (i) provides, "Nothing in this Ordinance shall deprive the court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any native law and custom, such law or custom not being repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by implication with any law for the time being in force."

In practice, these courts have original jurisdiction in most cases involving land tenure, succession, inheritance, and disputes arising out of marriage by customary law.

The procedure in these statutory native courts is in theory based on simplified versions of English rules, but the customary judicial procedure still largely predominates. For example, (i) proof may be obtained by judicial notice of customary law and, under the *Native Authority (Amendment) Ordinance No. 3 of 1945,* the court may request the Native Authority to declare the native law and custom governing any doubtful matter; (ii) litigants are represented by relations or friends and champions-at-law; (iii) there is widespread use of African elders and others with knowledge of local customary law as assessors, these serve both as witness to, and as jury on, facts; (iv) certain traditional practices, for example, the customary use of oaths in instituting litigation has been retained by statutory enactment; (v) most significant is the modification of the customary usage by the regulation of the number of those entitled to sit in a statutory court as judges.

(ii) *Land Law (Tenure, Succession and Inheritance)*

In his posthumously edited, *"The Dynamics of Culture Change,"* B. Malinowski remarked that culture change as a process by which the existing order of society is transformed from one type to another, is a permanent factor of human civilization. In Nigeria this is very true, but it is perhaps in land law more than any other subject that English law has played its creative role in transforming and/or adapting the indigenous law to the present-day needs of an industrial and commercial society. This may be instanced by the traditionally corporate and inalienable ownership of land gradually becoming individual and alienable, and the growth of landlord and tenant relationship. A noticeable phenomenon is the adaptation of English law to preserve the customary law: for example, the Western Region of the country has recently enacted a law based largely upon the English Administration of Estates Act, 1925; but this specifically preserves the rules of customary law in cases where

inheritance is to be governed by that law: for example, in the case of childless intestacy, the husband's property reverts to his parents' family and that of his wife to that of hers.

(iii) *Family Law*

Two topics may here be chosen to illustrate the impact of English law. *Marriage* may now be contracted according to (a) English law, that is to say, Christian marriage or marriage by special license or at the Registry. This results in the "voluntary union for life of one man and one woman, to the exclusion of all others." (b) Customary law. This permits polygamy.

*Legitimacy.* This may be explained better with a holding in a case. In *Edet v. Esien, (1932) 11 N.L.R. 47,* the legitimacy of a child born outside wedlock to a married woman was in issue. The court taking into account the dowry (that is, the marriage fee) paid by the husband said that natural justice dictated that the child belonged to the husband and was therefore legitimate. It was so held. The child would however have been illegitimate, if the woman were merely betrothed.

(iv) *General Instances*

In the subjects of Commercial and Industrial law and Evidence, English law has completely superseded native customary law. This, briefly, may be attributed to the new demands of entirely new conditions.

To summarize the nature of the impact, as a preface it may be remarked that generally speaking communities seek to maintain internal stability and to preserve their identities and interests against outside forces. Their political and social institutions are designed to achieve these ends. The structure of such institutions is not necessarily determined only by logical and conscious measures, but may also result from the development of traditional themes. In this sense, the nature of change and progress in the country may be better explained by the vitalist slogan of 'creative evolution' than any other philosophy.

It is therefore not surprising that there is an assimilation of English legal concepts by the customary law in the areas of Contracts and Torts; modification in Criminal and other Statutory Offences; supplementation in Evidence and Judicial Administration; and innovation in Commercial and Industrial law.

Like other such communities (past or present) Nigeria's is a pluralistic one with differing systems of law. Comparison may be odious, but it may be useful to recall the proliferation of systems of law in other pluralistic communities such as Rome before the edict of Caracalla in 212 A.D., the Frankish Empire, Ptolemaic Egypt, present-day Israel, Lebanon, India, and Pakistan, to name a few, to show that Nigeria's case is not *sui generis.*

One lesson from this internal situation is that its law reformers should be less provincial in their regard for other systems of law. If this were so, it may be that in the initial stages of its legal development, Nigeria may have to undertake extensive studies of foreign law and institutions in any projected law reform; and make the study of comparative law an entrenched feature of legal education in the country.

Here we briefly review three significant factors which are shaping the future of Nigerian law:

*The written Constitution* which the country has, has already begun to force a retreat from orthodoxy: for example, in moslem Northern Nigeria the *Sharia* (sacred law and theology based on the Koran) is now excluded from the whole field of Criminal law and procedure. The Criminal code is based on that of the Sudan, which in turn is based on that of India, which in turn is based on the English law.

*Law Revision Commission.* There is already one in the Western Region of the country which is doing an excellent work. Its recent labors have been enacted as the Property and Conveyancing law, 1959. In substance, this brings the law in that part of the country in line with the Law of Property Act, 1925, in England. It is, however, to be hoped that such Commissions will in time cultivate broader perspectives and cast their nets wider in search of precedents.

*Legal education.* In this context, this is both pivotal and crucial in any thinking about the law. So far this was partly carried out in the United Kingdom and partly at the Maliki schools of and for moslem Northern Nigeria. There is therefore need for a system of education rooted in the country which should reflect its aspirations today and tomorrow. To achieve this, great reliance will be placed on generous assistance from the outside in the initial stages. Such assistance may in the main take the form of faculty endowments, libraries, librarians, and fellowships for study abroad.

This review shows the present forces at work in the country's legal arena. But what form the law itself will take will depend largely on the quality and extent of research undertaken in the field. An example of such research is the project on the Restatement of African customary law of the School of Oriental and African Studies of London University, which anticipates a form between the American Restatements of the law of Contracts and Torts, and the Digest of customary law in Punjab made in 1845 by Sir William Rattigan and his successors.

Be that as it may, it will make more sense if eventually the legal minds of Nigeria can formulate their answers. Culture flowers more luxuriantly on its natural soil. Nigerian law will acquire its own slant when it speaks its language. This will occur when its research is conducted in Nigeria, on Nigerian materials, and by Nigerian brains.

## The Laws Administered by the Civil Courts in the Sudan

*Mansur Khalid*

The administration of civil justice in the Sudan has come to be governed since 1929 by a uniform code entitled the Civil Justice Ordinance and is essentially based on the English civil procedure rules modified insofar as is required by the local conditions. The code, which was designed to amend and consolidate various ordinances and regulations relating to the administration of justice in the country, deals with a host of subjects such as the constitution and powers of civil courts, jurisdiction and competence of the courts, institution of suits and procedure in civil causes of action, etc. But

beyond all that, it enunciates the laws to be applied by civil courts in determining issues that come before them. It is with the latter question, which comes under the Part II Chapter of the Ordinance, that I intend to deal.

The code here, broadly speaking, deals with three situations: (a) laws relating to personal matters; (b) general principles to be applied in selected areas; (c) cases where no such law exists.

*Law in Personal Matters.* Personal matters, according to section 5 of the Code, include matters of succession, inheritance, wills, legacies, gifts, marriage, divorce, family relations, and the constitution of wakfs.[1] This classification is necessitated by the fact that all those institutions and relationships come under the sway of the Islamic law, which, according to section 5, is the applicable law in cases where the parties are Muslims. The section further provides that such law is applicable except insofar as it has been modified by custom, a provision designed to cater for usages that have grown up with those institutions and which have helped to ease the rigor of the Islamic law without derogating from its basic underlying principles. The courts in applying or upholding such customs are guided by the requirement of section 5 (a) to the effect that the custom is not contrary to justice, equity or good conscience and has not been altered or abolished by any enactment or invalidated by the decision of a competent court. Such customs, as qualified by the foregoing provision, shall be the determining law in issues pertaining to such matters as marriage, inheritance, etc., between non-Mohamedan litigants.

One may be tempted to equate the application of custom under the Sudanese Code with provisions in some of the civil law codes citing custom as a secondary source of law.[2] But despite the general and broad terminology of the section, the courts in the Sudan refused to follow a liberal interpretation and restricted the term "custom" to "local customs originating by usage in the Sudan" and seemingly amongst Sudanese litigants—Mohamedans or non-Mohamedans. In *Bamboulis v. Bamboulis*[3] the court rejected the application of the Greek civil or canon law which was pleaded and applied the English matrimonial provisions on the ground that "English law is accessible to our judges and our advocates, all of them trained in or with a sound working knowledge of this system of jurisprudence, and it is of great importance that our courts shall administer a law which is understood, which is accessible to both parties and to the court . . . Adultery is adultery whether determined in accordance with English matrimonial law or the Greek civil or canon laws."[4] The parties, being non-Muslims, could have had their case determined by a Mohamedan court under Mohamedan law if they so voluntarily elected, since section 6 of the Mohamedan Law Courts

[1] The institution of wakf is the equivalent of the common law trust under Islamic law. The word is the substantive of the verb yukif which means to confine, i.e., confine the usufruct of a certain property to a named beneficiary.

[2] E.g., Art. 1, Swiss Civil Code, 1907, which provides that in the absence of a statutory provision the judge shall decide in accordance with customary law, or Art. 6 (2), Spanish Civil Code, 1889, which provides that in the absence of statutory law (*ley*) the judge can apply the custom of the place or general principles of law (*derecho*).

[3] A C/Rev./58/1953, per Lindsay, C. J.

[4] Quoted by Guttmann, "The Reception of the Common Law in the Sudan," 6 Int. & Comp. L. Q. (1957) 401, 412.

Ordinance provides that in addition to cases relating to marriage, divorce, succession, etc., amongst Muslim litigants the court can deal with any issues in any case arising between litigants, be they Muslims or non-Muslims, if they make a formal written demand asking the court to entertain the action and undertaking to abide by its decision.

At this point it is worthwhile alluding to the structure of Mohamedan law courts which exist alongside the civil law courts, a structure which is known and not unusual in predominantly Muslim countries.[5] These courts rank, besides the civil courts, from courts of first instance and appellate courts to a supreme court known as the Court of Distinction. Their substantive law is the Mohamedan law applied in the cases aforementioned, and they have their own rules of procedure.[6] The Mohamedan Courts, known as the Sharia Courts, are headed by the Grand Kadi, who comes immediately after the Chief Justice in order of precedence. Though the administration of Justice in each division rests with the respective heads of the two branches of the Judiciary, the administration of the Judicature rests essentially with the Chief Justice, who may delegate some of his powers in respect thereof to the Grand Kadi or any member of the High Court.[7] Safeguards against any conflict of jurisdiction between the Civil and Sharia Courts are provided for through the creation of a court on jurisdiction presided over by the Chief Justice and comprising the Grand Kadi, one Sharia High Court Judge and two Civil High Court Judges. The Chief Justice's power to preside over this court is the only power he cannot delegate and has to assume personally. Since the cases that have come before the Mohamedan Courts have always been between Muslim litigants, no such issue of conflict of jurisdiction has arisen.

*Selected Areas.* Part II then proceeds to lay down the law to be administered by the court in selected cases. These cases cover loans, interest, and assignment of debts. The code does not lay down substantive provisions of law; it lays down general principles to insure the equity of the transactions involved.

Section 6 (1) entitles the court in cases for the recovery of money lent or for the enforcement of any agreement made in respect of such money if the interest charged is excessive to reopen the transaction and order creditors to pay back any excess already received. The provision applies to a money-lending transaction irrespective of the name given to it.

Section 7 deals with claims for interest from a date antecedent to the date of the institution of the suit. The courts are required not to allow recovery unless the claim is of such a nature that at the time when the debt was in-

[5] The only exception is Turkey, which discarded the application of Islamic law even in personal matters in 1924 under Kemal Ataturk, when the law abolishing the Caliphate was passed, and adopted the Swiss Civil Code, the most modern European code. Some of the other Muslim countries, e.g., Egypt and Libya, though maintaining the Islamic law have abolished the Sharia Courts and incorporated Sharia jurisdiction in circuits within a unified system of law. See Qasem, "A Judicial Experiment in Libya: Unification of Civil and Sharia Courts," 3 Int. & Comp. L. Q. (1954) 134.

[6] The powers of the Sharia Courts are provided for by the Mohamedan Law Courts Ordinance, 1902.

[7] Art. 100 of the Transitional Constitution of the Sudan, 1956.

curred there existed an express or implied agreement for the payment of interest.

Section 8 deals with assignments of debts or claims for a liquidated sum of money and provides that such assignments shall be enforced only if they are absolute and in writing and if express notice in writing of the assignment has been given to the debtor.

This provision does not affect debts accruing on a negotiable instrument. Assignment of such instruments can be by endorsement and delivery under the provisions of the Bills of Exchange Ordinance.

*Absence of Express Provision.* Apart from the provision aforementioned and apart from any other enactment in force, e.g., the Bills of Exchange Ordinance, the Companies Ordinance, etc., the courts are required by section 9 to act in cases coming before them in accordance with "justice, equity, and good conscience." In my estimation, section 9 is the most important provision in the Code and indeed in the whole Sudanese Civil law. For it is through section 9 that principles of English Common law have crept into the Sudan law and it is through section 9 that a new body of *jurisprudence constante* was created. The Sudanese law, unlike the laws of some other Arab Muslim countries, does not provide for secondary sources of law. Article 1 of the Iraqi Civil Code of 1953 provides in sub-section 2 that in the absence of code provisions courts shall decide in accordance with customary law, and failing that, in accordance with those principles of Muslim law (Sharia) which are most in keeping with the provisions of the Code, without being bound by any particular school of jurisprudence and, failing that, in accordance with the principles of equity. The Egyptian Civil Code of 1949 also provides in article 1 (2) that in default of an applicable legislative provision the judge shall decide according to custom and in its default according to the principles of Muslim law, etc. Both Codes, evidently, attempted to achieve a synthesis of Islamic law principles and Western principles. This is largely due to the influence of a new school of legal thought led by Dr. Abdul Razak El Senhuri, an eminent Egyptian jurist who is the chief protagonist of this view.[8]

It should be noted that all those countries have adopted the Code Napoleon as a basis for their civil law and have abided by its principles except insofar as it is not in consonance with local conditions or is openly at variance with established Islamic principles or mores. It should be noted further that though Islamic law is uniformly accepted as the governing law in personal matters, the rules of Islamic law as regards other matters are relegated to a secondary place, and as is clear from the provisions of the Iraqi Code, the courts are required to apply the basic moral principles of Islam rather than the orthodox rules laid down by different schools of Islamic jurisprudence. The Sudan, on the other hand, has accepted the English common law scheme of things and as such cannot follow the structural pattern of the Iraqi or Egyptian Codes.

Historically, this can be explained in that the judges in the Sudan were

[8] See Liebesny, Impact of Western Law in the Countries of the Near East, 22 Geo. Wash. L. Rev. (1953) 127, 139. Dr. Senhuri was the chief architect of the new Iraqi Code.

recruited from lawyers trained in the English common law who followed the legal tradition with which they were conversant. Drawing on English authorities, applying common law principles as modified by local customs and abiding by the decisions of superior courts was more the rule than the exception. The tradition has been carried over to the extent that the law taught in the law schools in the Sudan is predominantly the English common law, and Sudanese judges and advocates are also, by and large, trained in the common law. This has been reinforced since independence by the recognition under the Transitional Constitution of the most basic attribute and indeed the bulwark of the common law: the independence of the Judiciary.[9] The application of English common law has assumed far-reaching dimensions in the Sudan. This can well be visualized when one realizes that no statutory enactment exists in the Sudan to govern matters such as contracts, sale of goods, or torts, and in all such cases the rules of English common law are taken for granted and applied under section 9 of the Civil Justice Ordinance. The judges, be they Sudanese or otherwise, in applying these laws have always endeavored to modify their provisions so as to meet local requirements. Time has shown the practicability of this system and the parties concerned are satisfied with its benefit and the necessity of maintaining it. Even in the heated passion and fervor of independence and post-independence, the agitation has been directed toward translating the laws and adopting Arabic as the language of litigation in the courts rather than toward rejecting the common law.[10] The question, however, has not been considered seriously as was done in India through the Law Commission of India in 1955.[11]

The courts, however, did not extend the principle of precedent in the Sudan to the application of English statutory law. This is understandable to lawyers trained in the common law system where the idea of analogy from statutes is frowned upon. The view was advanced that English statute law should be followed only when it codifies the common law or when it has been found necessary in the interests of equity and justice to amend the common law by statute.[12] This tallies with the conservative attitude of the English judges of rejecting any interpretation of the statute other than the grammatical interpretation, or, in the words of Professor Salmond, the letter of the law stands between its spirit and its judicial application.

Through section 9, therefore, the common law has percolated the fabric of the judicial system of the Sudan, thus giving rise to a Sudanese common law nourished by Sudanese traditions, mores and accepted usages. That this

[9] The Transitional Constitution was suspended on the morrow of the government take-over by the army on 17th November, 1958, and a new Judiciary Act was subsequently passed which preserved the façade of the independent judiciary.

[10] In a recent circular, the Chief Justice ordered that Arabic shall be the language of litigation in all criminal proceedings at all stages and in the lower courts in cases of civil litigation. Proceedings are still conducted in English in the High Courts and the Court of Appeal.

[11] The Law Commission, reporting on the question, concluded that it was not advisable to go back upon the system of precedent since the system has become a part and parcel of the Indian legal heritage. Report of the Law Commission of India, pp. 628–629.

[12] See Guttmann, *loc. cit. supra* note 4, at 411.

common law and the system giving rise to it are there to stay is an uncontested fact amongst lawyers in the Sudan today. This was recognized by Parliament before its dissolution when it refused to avail itself of Art. 113 of the Transitional Constitution asserting the validity of all laws in force in the Sudan immediately before the commencement of the Constitution unless and until altered, replaced, or amended by Parliament. Under the present Constitutional Orders, the Supreme Council of the Armed Forces enacted on the 17th day of November, 1958, that all laws in force before the suspension of the Sudan Transitional Constitution shall continue in force until repealed or amended by the appropriate authority. No such amendment or modification has been made since that time.

May I close with the words of Lord Wright, quoted by Mr. Setalvad, Attorney General of India, in his recent Hamlyn Trust lecture:[13]

> "In Blackstone's day the common law was the law of a few million people in England and Ireland . . . Now in these islands there may be perhaps forty millions living under English law, but the common law has long passed its old boundaries. Under its sway live teeming millions of the United States . . . Then there are Canada, Australia and New Zealand, great now but with unforeseeable potentialities. The enormous subcontinent of India has adopted, except for family or other racial or religious law, the common law which there regulates the great mass of dealings between man and man. In each of these great collections of mankind there are judges enunciating the law and schools teaching it, and professors meditating upon it, seeking to criticize and reform it. England cannot have a monopoly or even a primacy in this great and widespread development."

[13] Setalvad, The Common Law in India (1960) 226.

## PART II

## INTERNATIONAL CIVIL PROCEDURE—A SELECTIVE DISCUSSION

The chairman introduced the two speakers on the second topic of the meeting, Professor Hans Smit, Director of the Project on International Procedure, Columbia University School of Law, and Professor E. Herzog of Syracuse Law School. A discussion from the floor followed the presentation of their papers.

### The Terms Jurisdiction and Competence in Comparative Law

*Hans Smit*

The term jurisdiction has proved particularly popular in legal terminology. Indeed, its uses are so varied that in most cases its exact meaning can be determined only from context. Even etymologically, the term's meaning is not free from ambiguity. "Juris" is the genitive of "ius," the Latin equivalent of either law or right, and "dictio" is the Latin noun derived from the verb

"dicere," which transposed literally means "to speak." Originally, therefore, the term jurisdiction could and did describe both the legislative and the adjudicative process.[1] Quickly, however, the function was identified with the authority under which the function was exercised. As a result, the term jurisdiction was used almost from the beginning to denote a power as well as its exercise. Once the foundations for undiscriminating use had been laid, little was required for further proliferation of meaning. At present, the term jurisdiction may refer not only to a power or the exercise of that power, but also to the body which exercises that power and the territory within which that power may be exercised. In a number of instances, it may even relate to the particular manner in which a power is exercised. For example, when due notice has not been given, an adequate opportunity to be heard has not been afforded, or a defendant not been given the assistance of counsel required by the Sixth Amendment to the United States Constitution[2] the court is often said to lack jurisdiction.

In the United States, the term jurisdiction is used most frequently to describe a power or authority, but far from leading to desirable uniformity, its use in that sense has led to much confusion.

The term jurisdiction may describe legislative, executive, and judicial power and is often used to denote any of those powers without a qualifying adjective.[3] Broadly defined, legislative jurisdiction is the power of a political body to apply its laws to a given person, thing, or occurrence; executive jurisdiction is the power of a political body to take administrative action in regard to a given person, thing, or occurrence; and judicial jurisdiction is the power of a political body to subject a given person, thing, or occurrence to its judicial processes.

Whether a specific body possesses any of these powers is not necessarily determined by its name. For example, a legislative body may exercise a judicial function and a judicial body may act as an administrator.

While particularization by the use of one of the three adjectives here discussed contributes to elimination of some of the confusion surrounding the use of the term jurisdiction, the addition of a descriptive epithet is not dispositive of all problems.

Clearly, in describing and defining a power or authority, the framework within which the power or authority must be exercised and its validity judged is of the utmost importance. What may be a valid exercise of power in one context, may be invalid in another. For example, a state may have the power under its own constitution to subject an act committed abroad to the reach of its criminal laws, but such power may not necessarily be recognized under international law.[4] Consequently, the use of the term jurisdiction in such a case to describe the power or lack of power of the state is meaningful

[1] Compare Gaii Institutiones I, 6 with Codex Iustiniani III, 13 and Digesta II, 1.

[2] See e.g., Johnson v. Zerbst, 304 U.S. 458, 467 (1938). Some courts have even confused the question whether it had competence with the question whether a cause of action was stated. See, e.g., Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 249 (1950).

[3] For a discussion of these three meanings of the term jurisdiction, see Restatement (Second), Conflict of Laws, Introductory Note to § 42 (Tent. Draft No. 3, 1956).

[4] See Restatement, Foreign Relations Law, Reporter's Note to § 29 (Tent. Draft No. 2, 1958).

only if the legal structure within which the term is used is first indicated with particularity.

The possible number of legal structures within which a given power may be defined may vary depending on the case under consideration and the kind of power involved. Here, since we are concerned primarily with judicial powers, the attention will be concentrated on possible definitions of judicial jurisdiction. In the case of a federative state such as the United States, the question of whether a political body has judicial jurisdiction may be answered within the context of at least three, and in some cases four or five, legal structures.

First, that question may be interpreted to require an answer under the laws of the political body the jurisdiction of which is to be determined. Those laws, which, of course, include the political body's own constitution or charter, may contain provisions circumscribing the permissible scope of judicial jurisdiction. For example, the judicial jurisdiction of the United States is subject to limitation imposed by the due process clause of the Fifth Amendment to the United States Constitution.[5] Similarly, although only scant attention has been given to this possibility, the corresponding powers of a state of the United States may be limited by the due process clause of its constitution.

Second, whether a political body has the requisite jurisdiction may be considered a problem governed by the laws of the more encompassing political body or bodies of which it is a part. For example, in the United States whether a state has judicial jurisdiction in this broader sense is affected directly by the due process clause of the Fourteenth Amendment to the United States Constitution.

Third, questions of jurisdiction may be interpreted to require an answer under international law.[6]

Finally, and fourth, the scope of a political body's jurisdiction may be determined under the law of another political body. For example, when recognition is claimed for a foreign judgment, American courts, in determining whether the foreign state had judicial jurisdiction, apply their own law rather than that of the foreign country.[7] Nussbaum, following the example of Bartin, a leading French scholar, has proposed that jurisdiction in this latter sense be called "indirect" jurisdiction.[8] Sometimes this concept of indirect jurisdiction is also called international jurisdiction.[9] Again, problems of indirect or international judicial jurisdiction may arise in more than one context. For example, the question of whether New York courts may grant

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[5] See Restatement (Second), Conflict of Laws, Introductory Note to Ch. 3 (Tent. Draft No. 3, 1956).

[6] International law does not seem to have developed criteria for determining the permissible scope of a nation's judicial jurisdiction. However, international law does purport to define the limits of a nation's legislative jurisdiction. See note 4 *supra;* Draft Convention on Jurisdiction With Respect to Crime, 1935 Am. J. Int'l L. 435 (Supp. 1935).

[7] See Reese, The Status in This Country of Judgments Rendered Abroad, 50 Colum. L. Rev. 783, 789–90 (1950).

[8] Nussbaum, Jurisdiction and Foreign Judgments, 41 Colum. L. Rev. (1941) 221.

[9] Nussbaum disapproves of the use of this term to describe the jurisdictional concept here discussed. Nussbaum, *cit. supra* note 8, at 225.

recognition to a French judgment cannot be answered exclusively on the basis of New York rules as to the permissible scope of French indirect judicial jurisdiction. Whether France had indirect judicial jurisdiction would also have to be determined under federal rules derived from the due process clause of the Fourteenth Amendment to the United States Constitution.

The power to subject a given controversy to judicial processes is possessed only by a state or a political subdivision thereof. Courts do not usually have authority to decide whether the power to subject a particular person, thing, or occurrence to the judicial process should be exercised. On the contrary, in the usual case it is the state, and specifically its legislature, which makes that basic determination. Courts may decide only whether the controversy submitted to it falls within the legislative classification and, in those cases in which legislative action is subject to judicial review under international or constitutional law, whether the state had the judicial jurisdiction to subject the person, thing, or occurrence to the judicial process.[10]

Nevertheless, the custom to speak of jurisdiction of courts is most inveterate.[11] This phenomenon might not be particularly objectionable if the term jurisdiction in this context were used only to denote the judicial jurisdiction of the state which gave the court the power to hear the controversy. However, the difficulties inherent in undiscriminating use of the term jurisdiction are further compounded by the fact that it is also used to describe the power of a court to adjudicate a particular controversy. Used in that sense, the term jurisdiction is a synonym for what is more appropriately called competence.[12]

Rules of competence may be rules of general or rules of specific competence. Rules of general competence, or, as they are called in France, of *compétence générale*,[13] provide generally what cases courts are competent to hear. Rules of specific competence, called rules of *compétence spéciale*[14] in France, provide what particular court may hear a particular controversy.

Rules of specific competence may, in turn, be distinguished depending on whether they provide what type of controversy may be submitted to a particular type of court or whether they provide in what geographical district a particular type of proceeding must be brought. The latter rules are frequently called rules of venue in the United States and rules of *compétence territoriale in France*. The former have no generally more descriptive name in the United States, but may properly be called rules of competence relating to subject matter; in France, they are called most frequently rules of *compétence d'attribution*.[15]

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[10] Accord, Restatement (Second), Conflict of Laws, Introductory Note to Ch. 4 (Tent. Draft No. 3, 1956).

[11] Even the new draft of the Restatement of Conflict of Laws, which recognizes the distinction between jurisdiction and competence, has a Chapter 4, entitled "Jurisdiction of Courts." Restatement (Second), Conflict of Laws, Ch. 4 (Tent. Draft No. 3, 1956).

[12] Both the Restatement of Judgments and the proposed revision of the Restatement of Conflict of Laws use the term competency. Restatement, Judgments § 7 (1942). Restatement (Second), Conflict of Laws § 47, comment *g* (Tent. Draft No. 4, 1957).

[13] See 1 Bartin, Principes de Droit International Privé § 123 (Paris 1930).

[14] See Batiffol, Traité Elémentaire de Droit International Privé no. 683 (3d ed. Paris 1959).

[15] See Cuche & Vincent, Précis de procédure civile et commerciale no. 200 (12th ed. 1960).

Rules of general competence may be separate and distinct from rules of specific competence. For example, American non-resident motorists statutes generally provide that the courts of a state are competent to adjudicate a controversy resulting from an automobile accident caused within the state without providing what particular courts within the state may adjudicate controversies of that nature. Similarly, in France, articles 14 and 15 of the Civil Code provide roughly that a Frenchman may sue or be sued in the courts of France without indicating specifically what particular French court may hear what particular controversy involving a Frenchman.[16] In both cases, the particular American or French court that is competent can be determined only by applying rules of specific competence. The distinction between rules of general and specific competence becomes particularly striking when the rules of general competence are not sufficiently implemented by rules of specific competence. In France, when Article 14 or 15 of the Civil Code is applicable but the usual rules of *compétence territoriale* do not point to any particular French court competent to adjudicate the controversy, case law has developed special rules of *compétence territoriale* which permit the plaintiff to initiate suit in the court of his domicile or, if he has no domicile in France, in any French tribunal competent with respect to the subject matter.[17] In Holland case law has gone the opposite way. Article 127 of the Dutch Code of Civil Procedure provides that a foreigner may be sued before a Dutch court in regard to obligations incurred toward a Dutch national. However, the Dutch Supreme Court has deprived this provision of general competence of all significance by holding that, if usual rules of what Dutch learning frequently calls geographical competence do not point to any specific court competent to adjudicate the controversy, Article 127 is of no avail to the Dutch national who wishes to sue a foreigner in the Dutch courts.[18]

In many instances, rules of general competence are not defined separately. For example, in Germany rules of general competence can be distilled only from rules of venue.[19] To a certain extent, the same situation prevails in France in which rules of venue or *compétence territoriale* have been interpreted to embody rules of general competence in cases in which a Frenchman is not a party to the controversy.[20]

All of the foregoing may show that use of the term jurisdiction to denote any of the various forms of judicial jurisdiction, of general and of specific competence here discussed is undesirable. Use of the term jurisdiction to denote some of the civil law concepts of competence would seem particularly inappropriate since in many civil law countries there are no constitutional notions of due process which have a bearing on questions of judicial jurisdiction. In civil law countries lack of competence is ordinarily only a defense

[16] For more extensive discussion of these articles, see de Vries & Lowenfeld, Jurisdiction in Personal Actions—A Comparison of Civil Law Views, 44 Iowa L. Rev. (1959) 306; Nadelmann, Jurisdictionally Improper Fora, in XXth Century Comparative and Conflicts Law—Legal Essays in Honor of Hessel E. Yntema (1961) 321.

[17] See Batiffol, *op. cit. supra* note 23, no. 691.

[18] Van der Goes v. Schönstedt, Hoge Raad (Burg. Kamer), Dec. 5, 1940, [1941] Nederlandse Jurisprudentie no. 312, with annot. E.M.M.

[19] Nussbaum, *cit. supra* note 8, at 222; Rosenberg, Lehrbuch des Deutschen Zivilprozessrechts § 10 (8th rev. ed. Berlin 1960).

[20] See Batiffol, *op. cit. supra* note 14, nos. 699, 700.

which may be advanced in the proceedings, but does not render the judgment subject to collateral attack. In addition, questions relating to such subjects as due notice which in the United States have been construed to affect judicial jurisdiction, are ordinarily devoid of jurisdictional significance in civil law countries. For example, as Professor Nadelmann has pointed out,[21] the French provisions regulating service on a person beyond the territorial limits of France afford no reasonable guarantee that the documents served will actually reach the person served. Nevertheless, a judgment based on such service, although it may not be recognized in the United States, is perfectly good in France.

More discriminating terminology to describe judicial powers would undoubtedly facilitate analysis and avoid unnecessary misunderstandings. What terminology should be selected is mostly a matter of semantics and personal predilection. No attempt will be made here to provide distinguishing definitions. If these brief remarks stimulate further analysis and more precise description of judicial powers here and abroad, they will serve their principal purpose.

[21] Nadelmann, *supra* note 16, at 332–33.

## Proof of Facts in French Civil Procedure: the Reforms of 1958 and 1960

*Peter E. Herzog*

Soon after its accession to power in May 1958, the DeGaulle régime embarked upon an ambitious program of law reform, not only in the constitutional area, but also in the less exciting fields of judicial organization and civil procedure. A description in English of the changes affecting court organization and selection and tenure of judges is available.[1] I shall discuss the—quite significant—changes relating to proof of facts by witnesses. They can, perhaps, be best appreciated after a brief discussion of the rules in effect before 1958.[2]

In a French civil suit, when witnesses are to be heard, a special procedure called *enquête* is used. The party offering proof by witnesses asks the court for an order authorizing an *enquête*. The order will list the facts about which testimony is to be given. Before 1958, only facts listed in the order could be proved by the witnesses. In actions before the court of general jurisdiction, the *tribunal civil*, witnesses were not heard by the full court but by a judge delegated by it for the purpose. Before the beginning of the *enquête*, each party had to serve the other with a list of its witnesses. Only witnesses mentioned on the list and formally summoned could be heard. Certain groups of persons, including close relatives of the parties and persons convicted of major crimes, were not allowed to testify under oath. In addition, under the Code of Civil Procedure other classes of persons (including more distant relatives, servants, persons who were guests of the party in the recent past, and persons convicted of certain crimes) had to be excluded if an objection (*reproche*) was raised by the adversary. The witnesses were

[1] Kock, The Machinery of Law Administration in France, 108 U. of Pa. L. Rev. (1960) 366.

[2] See Morel, Traité Elémentaire de Procédure Civile (2d ed. 1960) 392.

questioned by the judge, not by the parties. Strict formal requirements governed the conduct of the hearing. The minutes had to note that the formalities were observed.

The *enquête* concluded, the full court took the case up again. It based its decision on the testimony of the witnesses as recorded in the minutes (there is no verbatim transcript of testimony in France). In the case of a failure to observe the formal rules governing an *enquête,* the *enquête* was declared void by the court. Only the minutes of the *enquête* could be relied on in deciding this point. A failure on the part of the clerk to note accomplishment of formality, therefore, was fatal. If the *enquête* was declared void and the parties or their counsel were responsible for the failure to observe the legal requirement, it could not be repeated. Before the *juge de paix* and the *tribunal de commerce,* as well as in summary proceedings before the *tribunal civil* a simplified *enquête* procedure was in use.

Because the *enquête* procedure before the *tribunal civil* compelled the court to decide issues of fact on the basis of a written record, without the possibility of seeing and hearing the witnesses, it was widely criticized. The excessive formality of the procedure was also felt to be unnecessary.

The reform of 1958[3] has attempted to overcome the defects in the *enquête* procedure. The new procedure follows to some extent the rules which were applied in summary cases. The differences between the various types of *enquêtes* were largely abolished.

When authorizing an *enquête,* the court may order the hearing of the witnesses by a delegated judge or the court itself. That the *tribunal de grande instance* (the former *tribunal civil*) may itself hear the witnesses is probably the keystone of the reform of 1958. In addition, the powers of the judge (or court) conducting the *enquête* have been increased considerably. Witnesses may be asked questions on any point by the judge, whether the point is listed or not in the order authorizing the *enquête.* The judge (or court) may also call witnesses not mentioned in the lists exchanged by the parties, and may confront witnesses with each other and with the parties. The whole *reproche* procedure has been abolished—which increases the number of persons available as witnesses. The fines for recalcitrant witnesses have been increased considerably.

In addition, a number of steps were taken to simplify the formal rules governing an *enquête* and to reduce delay and expense. The order granting or denying an *enquête* is no longer subject to an immediate appeal. Failure to note accomplishment of a formality in the minutes is no longer fatal if other documentary evidence exists to show accomplishment of the formality. An *enquête* declared void may be repeated. Papers to be served in connection with an *enquête* may be served by mail, rather than through the *huissier,* an official.

The reform of 1958 has been generally well received, except that some writers have felt that too much power has been given to the courts. Some

[3] Decree No. 58–1289 of Dec. 22, 1958, Journal Officiel, Dec. 23, 1958, p. 11608, [1959] Dalloz Legislation 45 (the Minister's report at 335), [1959] Juris-Classeur Périodique III No. 24124. See Blanc, La Nouvelle Procédure Civile (1959) 140; Cornu and Foyer, Procédure Civile, Mise à Jour 1960, (1969) 77; Cuche and Vincent, Précis de Procédure Civile et Commerciale 550 (12th ed. 1960).

further changes were made in the *enquête* procedure in 1960,[4] but the power of the courts has not been reduced. By the amendments of 1960 the idea of a substantially uniform *enquête* procedure for all courts was abandoned. Special rules will govern the procedure before the *tribunal d'instance,* the successor of the *juge de paix*. Before that court no list of witnesses need be furnished, and the witnesses may be summoned informally. Any witness present may be heard. The new amendments provide that even parties in default must be informed of a decision allowing an *enquête,* and this applies to *enquête* proceedings before all courts. Additional changes concern matters of procedural detail.

By permitting hearing of witnesses by the court itself, rather than a delegated judge, the reform has brought French civil procedure, as far as it deals with proof of facts, somewhat closer to Anglo-American concepts of a civil action. Still, the differences between the French and the American systems remain great. More recently, French scholars have paid increased attention to American procedure. In the reports to the amendments of 1958 and 1960 the French Government promises an entirely new code of civil procedure. It will be interesting to see whether, and to what an extent, Anglo-American concepts find a place in that code.

[4] Decree No. 60-802 of Aug. 2, 1960, Journal Officiel, Aug. 5, 1960, p. 7250 [1960] Dalloz Legislation 287, [1961] Juris-Classeur Périodique III No. 25923 (with report of the Minister).

## PART III

## "XXTH CENTURY COMPARATIVE AND CONFLICTS LAW—LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA"

At the invitation of the presiding officer, the president of the American Association for the Comparative Study of Law, co-sponsor of the meeting, Dean Miguel A. de Capriles, took the chair. He expressed gratitude at being called upon to preside over a part of the program particularly close to the heart of his Association as publisher of the American Journal of Comparative Law. He introduced the next speaker, Professor Kurt H. Nadelmann.

*Mr. Nadelmann.* The printed program announces a panel discussion of the new book, "XXth Century Comparative and Conflicts Law—Legal Essays in Honor of Hessel E. Yntema," by the Editors of the volume, Professors Arthur T. von Mehren, John N. Hazard, and myself. Some of you will know of the volume, brought out by us on behalf of the Board of Editors of the American Journal of Comparative Law. At this moment, the volume, published by A. W. Sijthoff, Leyden, The Netherlands, is in the hands of only a few. A discussion of its contents, thirty-eight essays on current problems in the fields of comparative law and conflict of laws written by leading scholars from fifteen different countries, therefore, would be premature. The item on the program will be limited to a technical presentation of the book to the assembly, and I do so at the request of my two colleagues.

To formally present the book, I think I can do no better than read the "Foreword," signed by all members of the Board of Editors of the American Journal of Comparative Law, except the Editor-in-Chief, Professor Hessel E. Yntema.

FOREWORD

"The Editors of *The American Journal of Comparative Law* take pleasure in presenting to their Editor-in-Chief, Hessel E. Yntema, on the occasion of his seventieth birthday this volume of legal essays entitled *XXth Century Comparative and Conflicts Law*. The volume honors Hessel Yntema for his untiring dedication to the Journal and that for which it stands: better understanding of the law, its problems and functions through increased knowledge about the legal systems of the world. That many leading foreign scholars have joined their American colleagues in this tribute indicates the esteem in which Hessel Yntema is held abroad as well as at home for his life-long devotion to this goal as teacher, author, editor and member of international bodies and organizations. The Board of Editors feel deep satisfaction in the production of a volume of high significance to Comparative and Conflicts Law in honor of their distinguished colleague and chief.

"Words can hardly give proper expression to the gratitude of the members of the Board to Hessel Yntema for his work in editing *The American Journal of Comparative Law* since its creation in 1952. Although the Journal is a joint venture of the Board, the labor has been Hessel Yntema's. Only a deep devotion to Comparative Law can induce one to carry the heavy burden of editorial responsibility for this Journal. The members of the Board of Editors, proud of the success of *The American Journal of Comparative Law*, for which so much of the credit is due to Hessel Yntema, offer *XXth Century Comparative and Conflicts Law* to him as a token of their gratitude and esteem. They wish him long life and much happiness on the occasion of his seventieth birthday.

"The Board of Editors desire to express appreciation to those who made the volume possible: The contributors in the first place; The American Association for the Comparative Study of Law, Inc., for financial support and Alexis C. Coudert, its past president, for his assistance; the Editors of the volume, for undertaking the onerous task of editing *XXth Century Comparative and Conflicts Law*. The Board also acknowledge the cooperation and assistance of the publisher and, in particular, its director, G. de Flines; and the helpful secretarial work of Mrs. Richard A. Wiley.

January 17, 1961"

The Board of Editors in this case did not have the benefit of the aid of its chief, the Grand Master Editor. Had it had, I am sure that what I discovered only the other day would not have happened. In the "Foreword" we say: "The Board of Editors desire to express appreciation to those who made the volume possible: The contributors in the first place; the Association, . . .". Is it not Hessel Yntema who made the volume possible in the first place? We may owe him an apology for a terrible editorial *lapsus*.

This is all I think I should say on this occasion. I take great pleasure in presenting to Professor Yntema a copy in *de luxe* binding of the volume published in his honor.

The *chairman* and the assembly joined in expressing to Professor Yntema, vice president of the two Associations sponsoring the meeting, congratulations and good wishes. Professor Yntema asked to be recognized.

*Mr. Yntema.* This is an occasion when words are pale reflections of thought. It is a signal honor to be remembered on seventy years of age, and notably so in the company of a distinguished leader of the bar, sage, forthright, liberal-minded, to whose interest in the advance of legal scholarship and reform our Association is much indebted, *Phanor J. Eder.* To him on his eightieth year our first tribute is due.

But to one such as myself who has had the fortune to devote an academic career to the most significant and challenging of pursuits, the study of law and government, such recognition is the more precious as it is rare. In such a career, the rewards most cherished for the most part are casual and intangible—the tacit regard of perceptive students and esteemed colleagues, or the satisfaction when contributions, cast like bread upon the waters, are occasionally acknowledged. Indeed, intellectual activity of this nature is its own chief reward. Hence, I assure you that of all imaginable possibilities there could be none more prized than to receive a token, in the words of the poet, more enduring than bronze,—a volume, admirably prepared and elegantly printed, comprising a variety of notable contributions on comparative and private international law by a number of highly esteemed colleagues in America and abroad. There are no words to express appreciation of such a gift.

It would be unjust of one to whom such a volume is dedicated to assume too much credit. I like to think rather that the volume is symbolic of the gathering interest in the United States in the international aspects of legal science. As such, it prompts some acknowledgement, not only of the generous thought that conceived, and the painstaking care that ensured the excellence, of the volume, but also to all those with whom I have been privileged to associate in the effort to advance the study of comparative and conflicts law in the United States in recent years:—to the American Foreign Law Association and the leading Law Faculties, now more than a score in number, which, through the American Association for the Comparative Study of Law, have generously sponsored the American Journal of Comparative Law, to my colleagues on the Board of Editors of the Journal, who have loyally assisted in the enterprise, and in particular to the special editors and the executive secretary, who have shared the burden of editing, not to speak of the many other contributors, whose works have lent distinction to the pages of the Journal. To these also the volume should be dedicated.